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CURRENT EVENTS.

"Do not Lower the Flag.—The C. L. J. has won its reputation and influence by its just and independent tone, by its distribution of praise and blame according to moral desert as well as ability, and by its avoiding even the appearance of venalty or interest, in blame or praise of men and books in the law."—W. L. Penfield.

The Columbia Jurist. — The *Columbia Jurist* has revived after a long vacation, and comes out looking all the better for having stopped a while to take breath and cool off. It pays attention to us in two of its editorials in a manner which would give us a first class advertisement if it had more circulation. In one of these editorials it intimates that we are a "cowboy," and then the young gentleman who evolved that brilliant idea, (what if we were to call him a "kid?") calls us "brother." In another, alluding to Mr. Lawson's recent article in this Journal, headed "Accidents are not Crimes," the smart freshman concludes that "the Dutch *have* taken Holland."

Criminal Libel—Fining an Editor who never saw the Publication until it was in Print.—The *Montreal Legal News*, referring to the late case of Reg. v. Sheppard, tried at Montreal, says: "It has shocked some persons that a defendant should be criminally prosecuted for the publication of a libel which he did not see until it was in print. In the result no undue severity is shown. Mr. Sheppard escapes with a fine." We do not understand upon what principle an editor could be made to answer criminally for a libel published in his paper, which he never saw until it was in print, unless he concocted it or directed the writing of it and left the details to an employee. Intent is the gist of every criminal act, and, so far in our reading, we have escaped knowledge of any principle which will make a man answerable criminally for the misdoings of an agent or servant not previously directed or authorized by him.

Judicial Indifference to Public Opinion. —The *Albany Law Journal* thus discourses concerning the late Justice Westbrook: "His very worst fault, it seems to us, was his indifference to public opinion. A judge ought to be as sensitive to the vagaries of public opinion as a woman. Justice Westbrook was not; conscious of rectitute, he was too regardless of appearances, and it was this characteristic that laid him at the mercy of a scandalous and reckless libeller like the New York *Times*. He probably had lived down all that ridiculous and sorry scandal, but it probably made its mark on his soul." We do not believe that "a judge ought to be as sensative to the vagaries of public opinion as a woman." He ought to strive to deserve the good opinions of candid and judicious men; but if he allows the "vagaries of public opinion" to influence his judicial conduct, he is not fit to be a judge.

Points in the Riel Case.—According to the *Manitoba Law Journal* the points determined in this and the *Connor case*,[1] may be summarized as follows:—"1. A stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge of murder or treason in the North West Territories. 2. The information may be laid before a stipendiary magistrate alone. An associate justice of the peace is necessary for the trial only. 3. Except for the purpose of arrest, it is not necessary that there should be an information at all; nor need the trial be based upon an indictment by a grand jury, or a coroner's inquisition. All that is necessary is a charge, and this need not be under oath. 4. The evidence may be taken in short-hand. 5. Writs of *certiorari* and *habeas corpus* cannot be issued by the Court of Queen's Bench in Manitoba to bring up the papers and prisoner upon an appeal to that Court. 6. The Court of Queen's Bench will

[1] 2 Manitoba Law Reports.

hear an appeal in the absence of the prisoner." It is obvious from the above that there is not quite as much "constitutional law" for malefactors in Canada as in the United States. We understand a stipendiary magistrate to be a sort of salaried justice of the peace. What would an American lawyer think of trying a citizen for the crimes of murder and treason before a court composed of two justices of the peace and a jury of six men, without any indictment by a grand jury, but upon a mere "charge"—made by whom the above statement does not disclose—but not even under oath? Our courts, which of late years have been so astute in upholding and enlarging what is termed "due process of law," would probably hold that the "process of law" invoked in this case is not "due." But the lords of the British Privy Council thought otherwise, and were so clear about it that they declined to hear the counsel for the Crown. The difference between the British and American constitution seems to be this: that by the former, "process of law" is "due" when the legislature enacts that it is "due;" but that, under the latter, it is not "due" unless the judge also thinks it is "due."

TAYLOR ON EVIDENCE—THE AUTHOR AND THE BOOK.—The *Law Times* (London) has the following: "The retirement of Mr. PITT TAYLOR, the well-known County Court judge, the better-known author of the standard treatise on the Law of Evidence, was not unexpected. He had been thirty-three years on the County Court Bench. * * * As we have said, Mr. Pitt Taylor is best known by his work on the Law of Evidence. It is very rare for an author on legal subjects to be accepted as an authority during his lifetime unless he becomes a judge of the High Court. In the person of Lord Justice Lindley, Lord Justice Fry, and Mr. Justice Stephen we have examples of judges whose works are accepted as authorities—they were so, indeed, before the elevation of those authors to the bench. But they were in very considerable practice, whereas Mr. Pitt Taylor was not. The treatise which he wrote, however, was masterly; it was not like Roscoe's Nisi Prius Evidence, a digest of cases, but an exposition of the rules of evidence, illustrated by a scholarly examination of cases. In all probability Taylor on Evidence will retain its reputation as long as legal tribunals are governed by any rules at all—which they will not be if women are allowed the full swing they have enjoyed in recent times. Mr. Pitt Taylor will, we hope, long live to enjoy his well-earned retirement, although no doubt, to an active mind like his, comparative inactivity will prove tiresome. Having recently issued a new edition of his book, his work may be said to be done." No doubt Mr. Pitt Taylor's work on Evidence is an excellent work. No doubt it is "masterly." But Mr. Pitt Taylor was not the "master;" Simon Greenleaf was. Taylor on Evidence is nothing else than Greenleaf's great work revamped and fitted to English statutes and decisions. No doubt the revamping was skillfully done; but it no more entitles the revamper to be regarded as a "master" than the copyist of a great painting is entitled to take rank with its author.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATIONS. [CONTRACTS—ESTOPPEL.] CONTRACTS OF MUNICIPAL CORPORATIONS TO PERFORM PRIVATE SERVICES — EFFECT OF THE HABITUAL MAKING OF SUCH CONTRACTS AS AN ESTOPPEL.—In the case of the *City of St. Louis v. The Steamboat Maggie P.*, recently decided in the United States Circuit Court for the Eastern District of Missouri, it is held by Brewer, J., that where a city's charter gives it control of its levee and harbor, and makes it the city's duty to keep its wharf and the river along the shore free from wrecks and other improper obstacles, it is not a part of its public duty to pump out and raise vessels which sink at its levee; and where it owns a harbor boat, it may make a valid contract with the owner of a vessel sunken at its levee, to pump out and raise it by means of such boat where its so doing will not interfere with the public service, and it will be liable for a breach of such contract like a private person; and in case it is sued for a breach of such a contract, made in its behalf by an officer through whom it has been in the habit of making such contracts, and of receiving compensation for their performance, it will

be estopped from asserting that such officer acted without authority. In delivering the opinion of the court the learned judge said: "When the case was first argued before me, the question arose in my mind as to whether the city could make, as a municipality, a valid contract for doing the work of pumping water out of the steamer and raising her, a contract entitling the city to compensation for performance and exposing to liability for non-performance — whether that was not a matter outside the scope of municipal powers; and I requested counsel to furnish briefs upon that question, which they have done. I have given the matter a good deal of thought and study during the summer, and, after some wavering, have reached this conclusion: The principle applicable to such cases, I think, is clear, and the only difficulty has been in the application to the case at bar. I suppose a city can make no contract for the discharge of a purely public duty, such a contract for performance as it can enforce compensation or expose itself to liability. It cannot use public funds in any such direction. A city cannot contract with me to put out a fire in my building, and then exact a compensation from me for the extinguishing of that fire, nor thus expose itself to liability if it failed to put out that fire. It is discharging a purely public duty. At the same time, when it has in its possesion instrumentalities and hires employees for the purpose of discharging some public duty, I see no reason why, when the exigencies of public duties do not require the use of those instrumentalities and employees, it may not make a valid contract to use them in some private service. The contract is binding on the one side as well as on the other, and there would be a liability on its part for non-performance, except so far as performance was interfered with by the exigencies of public duty, as by the sudden occurrence of a fire. Take the public school system; the city builds its public school buildings, employs its teachers, paying therefor by means of taxation. Now, I see no reason why the city might not say to one living outside the city, you may send your children to one of these schools for a stipulated sum. In respect to such a matter, the city would be keeping a private school, as it were, rendering private service, entitled to all the benefits and subject to all liabilities of a private contract. And, generally speaking, when public duty does not interfere with private service, a city may make a valid contract for the use of its instrumentalities in the latter. * * * Now, pumping water out of a sunken boat and raising it is a matter principally of private interest to the owner of the boat. It can not be said to be a of public nature. Of course, the removal of the boat, if it is a wreck, is a matter in which the public is interested, that the harbor be kept clear for other boats; but, so far as concerns the mere lifting of that boat out of the water by pumping the water out of the hold, that is a matter which specially interests and affects the owner of the boat. Such a contract as that, it seems to me, is one for private service, although I confess that incidentally it does affect the public in that it operates to keep the harbor clear. It is also true that there is no authority in any ordinance, at least none that has been cited, specifically empowering any officer of the city to contract for doing this kind of service. But I do not think that is very material, because the testimony shows that the city, through its officers, has been in the habit of making these contracts and receiving compensation therefor; and having made that a business, so to speak—having received gain from such contracts,—it does not lie in its mouth to say now that there was no officer authorized by ordinance to make this kind of contract. It has been doing the work and making money out of it, and if it has now made an unfortunate contract, it cannot say "nobody was authorized."

EVIDENCE [ADULTERY]—MARRIED WOMAN VISITING A BROTHEL.—In *Cane v. Cane*,[2] in the New Jersey Court of Chancery, the following propositions are ruled: 1. A visit by a married woman to a brothel, will, unless satisfactorily explained, justify the presumption that she went there for a criminal purpose. 2. Such conduct will not, however, afford evidence of guilt, if it is shown that the wife was decoyed there, by the procurement of her husband, and for the purpose of mak-

[2] 39 N. J. Eq. 148 (adv. sheets.)

ing a case against her. 3. A husband who seduces his wife before marriage, and, after marriage, sees her in a situation of temptation and does nothing to rescue her, and she yields, will be understood as having consented to her adultery. In the course of his opinion, Van Fleet, V. C., said: "Unless Mrs. Cane's visits to these places have been satisfactorily explained, there can be no doubt about what effect they must have against her as evidence of guilt. If she went to them fully understanding their character, and with full knowledge of the purposes for which they were used, attended by a man not her husband, it would require very strong evidence to convince any man at all familiar with human conduct that her visits were not made for a criminal purpose. Lord Stowell said, in Williams v. Williams,[3] that it was almost impossible to believe that a woman would go to a brothel for any but a criminal purpose; and, therefore, in his opinion, it had been properly held that such conduct on the part of a wife furnished sufficient evidence of adultery to justify a decree that she was guilty. And Dr. Lushington, in Astley v. Astley,[4] held that such conduct on the part of a wife must constrain a court to conclude that she had committed adultery. Undoubtedly, such conduct is always open to explanation, and if the wife can show that her visits were for an innocent purpose, or the result of accident, they will then, of course, furnish no evidence of guilt; and so, too, if it should be shown that the wife was decoyed to them, through the procurement of the husband, then, instead of furnishing evidence of guilt against her, they would show that the husband was trying to deceive the court, and to induce it, by false appearances, to pronounce an unjust judgment."[5] In Texas, under a statute there existing, the husband might decoy the wife to a brothel, for the purpose of getting criminating evidence against her, and then kill the male adulterer, and it would be justifiable homicide.

[3] 4 Eng. Ec. 416; 1 Hagg. Con. 299.

[4] 3 Eng. Ec. 303; 1 Hagg. Con. 714.

[5] Mr. John H. Stewart, the learned reporter, enriches the case with the following note: "That a married woman goes to a brothel, is *prima facie* evidence of adultery, Best v. Best, 1 Add. 411; Kenrick v. Kenrick, 4 Hagg. 137; Woods v. Woods, 4 Hagg. 138, note; but may be explained, Betts v. Betts, 1 Johns. Ch. 197; and so as to going to a hotel, Pond v. Pond, 132 Mass. 219; so, where a married man enters such a house in the evening and remains all night, Evans v. Evans, 41 Cal. 103; Van Epps v. Van Epps, 6 Barb. 320, 322; Langstaff v. Langstaff, Wright, 148; or is proved to have been shut up in a room alone with an unchaste woman, Daily v. Daily, 64 Ill. 329; see Lockyer v. Lockyer, 1 Edm. S. C. 107; Hunn v. Hunn, 1 T. & C. (N. Y.) 499; Richardson v. Richardson, 4 Port. 467; but his conduct, in going to a brothel, may be explained, Platt v. Platt, 5 Daly, 295; Latham v. Latham 30 Gratt. 307. As to explanations of a married man's associating with prostitutes for benevolent purposes, see, Ciocci v. Ciocci, 26 Eng. L. & Eq. 604. As to a husband's conduct, encouraging his wife to commit adultery, in order that he may obtain a divorce therefor, see Timmings v. Timmings, 3 Hagg. 76; Pierce v. Pierce, 3 Pick. 299; Cochran v. Cochran, 35 Iowa, 477; see, further, 14 Cent. L. J. 162."

PRIVATE INTERNATIONAL LAW [DOMICILE—FOREIGN MARRIAGE—COMMUNITY PROPERTY—FRENCH LAW]—EFFECT OF MARRIAGE AND RESIDENCE OF AN AMERICAN IN FRANCE AS TO HIS PERSONAL PROPERTY.—*In Harral v. Harral*,[6] it is held by the New Jersey Court of Errors and Appeals, in a learned opinion by Depue, J., that, "by the laws of France, the marriage of a foreigner in France without any contract as to property, followed by the establishment of a conjugal domicile in that country, will subject the property of the married person to the community law, and a government authorization under article XIII of the code is not necessary to the establishment of such a domicile." The case was this: H., whose birthplace was in Connecticut, went to Europe in 1869, for the purpose of acquiring the German language, and completing his professional studies. In 1872 he went to Paris, where he remained; and, in February, 1877, married a French woman in Paris, without any contract as to property. Immediately after the marriage he rented a house at Suresnes, a village near Paris, for two years, and took up his residence there with his wife. In May, 1878, he was brought to this country, and sent to a hospital for the insane, at Philadelphia, where he died in 1881. It was held that by his marriage in France, and the establishment of his conjugal domicile there, his personal property became subject to the community law, and that his widow, on his death, was entitled to the one-half part of it, notwithstanding that by his will, made before the marriage, he had bequeathed the whole of it to others.

[6] 39 N. J. Eq., 279 (adv. sheets.)

CHATTEL MORTGAGE [AFFIDAVIT OF BONA FIDES]—SUFFICIENCY OF—EFFECT OF BLANK IN.—In Manitoba they have a statute, of which there is probably a counterpart in England, in other provinces of Canada, and in some of the United States, requiring that every mortgage or conveyance of goods and chattels shall be filed within a specified time, toge her with an affidavit of execution, "and also with the affidavit of the mortgagor or his agent, that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage," &c. *In McIntyre v. Union Bank*,[7] the affidavit of *bona-fides* attached to such a mortgage contained the following recital: "The mortgagor in the foregoing bill of sale by way of mortgage is justly and truly indebted to me, Alexander McIntyre, the mortgagee therein named, in the sum of —— dollars mentioned therein." It was held that this affidavit was insufficient to make the instrument valid as against subsequent execution creditors. In giving the principal opinion in the case Dubuc, J., said: "The authorities agree on the point that affidavits of *bona fides* and of execution should be accurate, complete, and unambiguous. But the decisions differ somewhat as to what should be considered a sufficient variation or omission to render the instrument void as against the execution creditors. In Hamilton v. Harrison,[8] the affidavit of *bona fides* purported to have been sworn before 'F. B. F.,' without any addition; but the affidavit of execution was sworn before the same commissioner, his name being followed by the words, 'A Commissioner in B. R., &c.' It was held to be sufficient. It Walker v. Niles,[9] the statement annexed to the copy of the chattel mortgage did not distinctly give all the information required by the Act; but the statement and affidavit together contained all that was necessary, and this was considered sufficient. The same was held in Jones v. Harris.[10] In Blount v. Harris,[11] the attesting witness stated that he resided at Acton, in the city of London, while Acton was in the county of Middlesex; and in Hewer v. Cox,[12] the grantors were stated to reside at New street, Blackfriars, in the county of Middlesex, while Blackfriars is in the city of London. It was held in both cases that the variation was immaterial. In Nisbet v. Cock,[13] the signature of the commissioner to the affidavit of *bona fides* was omitted through inadvertence, although it was satisfactorily proved that the oath was in fact administered. The instrument was held invalid as against a subsequent execution creditor. *In re* Andrews,[14] and in Davis v. Wickson,[15] the omission of the 'him' at the end of the affidavit of *bona fides* was considered fatal, and the instrument held void as against subsequent execution creditors. In Murray v. MacKenzie,[16] the grantor was described in the bill of sale as residing at No. 37 Malpas road, Deptford, and the attesting witness as residing at 2 South Terrace, Hatcham Park road; while in the affidavit filed with it the deponent stated that the grantor resided at No. 73 Malpas road, Deptford, and he, himself, resided at 3 South Terrace, Hatcham Park road. This was held to be a fatal misdescription, not in compliance with the requirement of the statute. In *ex parte* Hooman, in *re* Vining,[17] the assignor was described as 'Esquire,' while he was lessee and manager of a theatre. The description was declared insufficient, and the bill of sale, notwithstanding registration, held null and void as against his assignee in bankruptcy. In Castle v. Downton,[18] the affidavit describing the grantor in bill of sale stated that he 'was until lately' a commercial traveller, while he was in fact a commercial traveller at the date of the execution of the bill of sale; it was held that the description of his occupation was insufficient. In Larchin v. The North Western Deposit Bank,[19] the grantor was described in bill of sale as an accountant, while he was a clerk in an accountant's department. The variation was held fatal.[20] If such

[7] 2 Manitoba Law Reports, 305; S. C. Manitoba, June, 1885.
[8] 46 U. C. Q. B. 127.
[9] 18 Gr. 210.
[10] L. R. 7 Q. B. 157.
[11] L. R. 4 Q. B. Div. 603.
[12] 3 E. & E. 428.
[13] 4 Ont. App. R. 200.
[14] 2 Ont. App. R. 24.
[15] 18 Can. L. J. N. S. 241.
[16] L. R. 10 C. P. 625.
[17] L. R. 10 Eq. 63.
[18] L. R. 5 C. P. Div. 56.
[19] L. R. 8 Ex. 80.
[20] This decision was affirmed in appeal in L. R. 10 Ex. 64.

a great accuracy is necessary in affidavits as to the occupation and residence of the grantor, and even of the attesting witness, *a fortiori* should it be required in the statement of the amount due by the mortgagor to the mortgagee, which might be considered as one of the most important and most material statements of the affidavit of *bona fides*. In the present case, the amount secured by the mortgage was left in blank. Of course, by referring the statement in the affidavit to the consideration of the mortgage, one might infer what the amount is; but according to the line of authorities on the subject, the only conclusion to be arrived at is that such a particularly important feature of the affidavit should be stated with great strictness and accuracy, leaving nothing to inference, vagueness or ambiguity."

SUICIDE—EFFECT UPON A LIFE INSURANCE POLICY.

There has been great diversity of opinion as to the legal effect of suicide, particularly in its relation to life insurance. The various decisions of the English, Federal and State courts, cannot, by any process of mental legerdemain be twisted into even the semblance of uniformity. We have attempted to follow the course of the decisions down to the present time. It is customary to insert in life insurance policies a clause exempting the companies from liability in case of self destruction. The tendency of the courts has been toward a more liberal construction of this saving clause—thus favoring the insured.

1. Effect of suicide upon a clause containing no proviso.—The *dicta* and guesses as to whether the act of suicide in itself is such a fraud as will avoid a policy in the absence of any express stipulation to that effect, are numerous and conflicting. There can be no doubt that a policy of insurance is not, under such circumstances, rendered void by self destruction while in a state of insanity. "It appears too clear," said Vice Chancellor Wood in Horn v. Anglo-Australian etc. Life Ins. Co.[1] "that when there is no express provision in the policy that in the event of the assured dying by his own hand the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity." To the contrary is the oft quoted *dictum* of Judge Black in Hartman v. Keystone Ins. Co.[2] "The court was very plainly right," said the learned Judge, "in charging that if no such condition had been inserted in the policy, a man who commits suicide, is guilty of such a fraud upon the insurers of his life that his representatives cannot recover for that reason alone."[3]

2. Accidental Self Destruction.—An accident, even though it be the result of that loss of perception produced by drink, cannot fairly be called the product of intent. The accidental taking of a dose of laudanum while under the influence of intoxicating liquor, is not such a death by his own hands as to come within such a saving clause.[4]

3. Atheism creates no Presumption of Suicide.—When the fact in issue is whether the deceased commited suicide, or came to his death by accident, it is not competent to show that the deceased was an infidel and an atheist and thence draw an argument in favor of intentional suicide.[5]

4. Degree and Effect of Insanity.—Voluntary Self Destruction—Knowledge of the Physical Consequences of the Act, Sufficient to avoid a Policy—Right and wrong—(a.)—English Rule—In the earliest case on this subject was Borradail v. Hunter,[6] a life insurance policy contained, *inter alia*, a provision that in case "the insured should die by his own hand, or by the hand of justice, or in consequence of a duel, the policy should be void." The insured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing at the time that he would thereby destroy his life, and intending thereby to do so; but that at the time of committing the act, he was not capable of distinguishing between right and wrong." Thus,

[1] 7 Jur. N. S. 673, Ct. of Ch. 1861.

[2] 21 Pa. St. 466.

[3] See also Nimick v. Mut. Ben. Ins. Co., 1 Bige. Ins. Cases, 689; Bank of Oil City v. Guardian Mut. Ins. Co. 6 Leg. Gaz. 348. (C. P.)

[4] Equitable L. Ins. Co. v. Patterson, 41 Ga. 338.

[5] Gibson v. American Mut. L. Ins. Co., 37 N. Y. 580.

[6] 5 M. & G. 639.

we find the element of moral responsibiity introduced into the very first case. A majority of the court held the policy void. Said Maule, J.: "It appears by the finding of the jury that the testator voluntarily threw himself into the water intending to destroy his life, but that at the time he did so, he was not capable of judging between right and wrong; and as a man who voluntarily drowns himself may do it to found a claim on a policy, though he may not think it right to do so, and though his mind may be so diseased that he does not know right from wrong,—which as I understand the finding of the jury, was the case with the testator,—it seems to me that the object of the condition would not be effected unless it comprehended such a case of self destruction."

The next case was the important one of Cliff v. Schwabe,[7] decided three years later. The policy provided that it should be void if the assured should die upon the high seas, or should go beyond the limits of Europe, or enter into the military or naval service except with the permission of the assurer,—and that "every policy effected upon his or her life, should be void, if such person should commit suicide, or die by dueling, or by the hand of justice." The assured died in consequence of having voluntarily and for the purpose of killing himself, taken sulphuric acid, and under circumstances tending to show that he was at the time of unsound mind. In an action by the administrator of the assured upon the policy, the defendant pleaded that the assured did commit suicide, whereby the policy became void. At the trial the judge directed the jury that in order to find "for the defendant it was necessary that they, the jury, should be satisfied that the assured died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent." It was held that these instructions were erroneous and that the terms of the exception included all acts of voluntary self destruction regardless of moral responsibility. "The words in question," said Baron Alderson, "seem to me in this case to have their proper construction when taken as including all cases of voluntary self destruction."[8]

(*b.*) *American Cases.*—The first American case was Breasted v. The Farmers Loan & Trust Company,[9] decided by the Supreme Court of New York in 1843. The policy concontained a provision that it should be void in case the insured should "die upon the high seas, or by his own hand, or in consequence of a duel, or by the hand of justice." The insured threw himself into the river and was drowned. It was claimed by the plaintiff that the assured was insane at the time and hence not responsible.

"Self destruction by a fellow man," said Chief Justice Nelson, "can with no more propriety be ascribed to his own hand, than to the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more his act in the sense of the law than if he had been impelled by irresistible physical force; nor can there be any greater reason for exempting the company from the risk assumed in the policy, than if his death had been occasioned by such means. * * * Self slaughter by an insane man or a lunatic, is not an act of suicide within the meaning of the law." This conclusion was reached in ignorance of the decision in Borradaile v. Hunter. The case was subsequently tried before a referee, who found as matter of fact, "that the assured threw himself into the Hudson River from the Steamship Era, while insane, for the purpose of drowning himself, not being capable at the time of distinguishing between right and wrong." Upon appeal, the judgment of the Supreme Court was affirmed. As in Borradaile v. Hunter, decided before the decision of the Court of Appeals, the destruction was voluntary, and the assured knew that the conse-

[7] 3 C. B. 435;

[8] In view of the course taken by the later decisions in the United States, it is interesting to note the position taken by the English Judges. The weight of opinion against the opinion was very strong. Chief Baron Pollock and Weightman, J. dissented, and to them may be added Creswell, J. in the court below. It may also be inferred that Tindell, C. J. and Erskine, J., would have done so,on the authority of Borradaile v. Hunter. Alexander, C. B., and Lord Tenderton, C. J., from their decisions at *nisi prius* in the unreported cases cited in the note to that case, and perhaps Lord St. Leonard, who, referring to the principal case, adds in a note *sed quere* the decision. See Bunyan Life Insurance, page 75.

[9] 4 Hill, 73.

quences of his act would be death. But his mind was so deranged as to incapacitate him from appreciateing its moral turpitude. In the English case great stress was laid upon the fact that the act was voluntary. In the American case, the finding that he threw himself into the river for the "purpose of drowning himself," was held not necessarily equivalent to a "voluntary act of self destruction." Whether the distinciton was well founded or not is now immaterial. It afforded a means of escape from the English decision and inaugurated a new line of decisions. Breasted v. The Farmers Loan & Trust Co. was somewhat modified in Van Zandt v. M. T. Ben. Ins. Co.[10] In Dean v. the Mut. Life Ins. Co.[11] the Supreme Court of Massachusetts followed Borradaile v. Hunter, in an opinion of great lenghth. In 1866, the Supreme Court of Maine[12] held that a policy conditioned to be void in case the insured died by his own hand was not avoided by suicide while in a fit of insanity. As to the degree of insanity, the court refused to accept the minimum of inteligence of the English decisions as the criterion. Said Appleton, C. J.: "Suicide for the benefit of another is rare, exceptional and quixotic. The love of life, the strongest sentiment of our nature, affords reasonable security against a danger so remotely probable. An insane man would be little likely to calculate the difference in value between a payment to be made immediately and one indefinitely deferred, and kill himself that some one else might receive the money at an earlier date in consequence of his committing suicide."

The Supreme Court of Kentucky,[13] held unamimously that in order to avoid the policy, the act must be voluntary. It was found that the assured killed himself, the act being the "involuntary offspring of a momentary paroxysm of moral insanity, which subjected his will and impelled the homicide beyond the power of self control or successful resistance." As to whether this was an act of insanity, and if so whether it avoided the policy, the court was equally divided.[14]

[10] 4 Allen, 96.
[11] *Supra.*
[12] Esterbrook v. M. M. L. Ins. Co. 54 Me. 224.
[13] St. Louis Mut. L. Ins. Co. v. Graves, 2 Bush., 268.
[14] See Merritt v. Ins. Co., 55 Ga. 103; Ins. Co. v. Moore, 34 Mich. 44; Ins. Co. v. Groom, 86 Pa. St. 92; Ins. Co. v. Waller, 57 Ga. 533.

The leading case of Terry v. Life Insurance Co.[15] came before the United States Circuit Court for the district of Kansas on a policy which involved the interpretation of the phrase "death by his own hand." The defendant requested the court to charge that if "the jury believed from the evidence that the said self destruction of the said George Terry, was intended by him, he having sufficient capacity at the time to understand the nature of the act he was about to commit, and the consequences which would result from it, then in that case it was wholly immaterial that he was impelled thereto by an insane impulse which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his actions." This instruction the court refused to give, but charged that, "if he was impelled to the act by an insane impulse which the reason which was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company was liable." Mr. Justice Miller said: "It being agreed that deceased destroyed his life by poison, it is claimed by defendants that he died by his own hand within the meaning of the clause, and that they are therefore not liable. This is so for true that it devolves on the plaintiff to prove such insanity on the part of the deceased, existing at the time he took the poison, as will relieve the act of taking his own life from the effect, which by the general terms used in the policy, self destruction was to have, namely, to avoid the policy. It is not every kind or degree of insanity that will so excuse the party taking his own life, as to make the company insuring liable. To do this the act of self destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse which the reason which was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition, that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand

[15] 1 Dillon—

there is no presumption of law, *prima facie* or otherwise, that self destruction arises from insanity; and if you believe from the evidence that the deceased, although excited and angry, or distressed in mind, formed the determination to take his own life because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy." Upon an appeal to the Supreme Court[16] the decision was affirmed. Said Mr. Justice Hunt: "We hold the rule on the question to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealously, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

As to whether the question of right or wrong was involved in the case of the Insurance Co. v. Terry, Longyear, J., in Moore v. Connecticut Mut. Life Ins. Co.,[17] said: "I therefore hold that the question was disposed of finally by the Supreme Court in a manner absolutely binding on this court. This ability to judge between right and wrong refers to a principle of the human mind: it does not refer to any tenet of religious belief; it does not depend at all upon what a man's religious belief may be, or whether he has any or has not. It does not depend upon whether he believes in a God, or a future state, or the the contrary."[18]

The words, "general nature, consequences and effect of the act," have been interpreted by Longyear, J., as follow:[19] "They do not refer to the act, in my opinion, by which the deceased took his life. They are broader than that; they refer to the entire act, not only the act by which he took his life, but the result of it."

In the case of Manhattan Life Insurance Co. v. Broughton,[20] Mr. Justice Gray said: "These instructions are in exact accordance with the adjudications in the case of Terry and Rodel; and upon consideration we are unanimously of opinion that the rule so established is sounder in principle as well as simpler in application, than that which makes the effect of self destruction upon the interests of those for whose benefit the policy was made, to depend upon the very subtle and difficult question, how far any exercise of the will can be attributed to a man who is so unsound of mind that, while he foresees the physical consequences of the act, he cannot understand its moral nature and character, or in any just sense be said to know what it is that he is doing. If a man's reason is so clouded or disturbed by insanity as to prevent his understanding the real nature of his act as regards either its physical consequences or its moral aspect, the case appears to us to come within the forcible words uttered by the late Chief Justice Nelson in the earliest American case upon the subject."

(*c.*) *Effect of Suicide upon an Assigned Policy.*—Where a life insurance policy contains a proviso that it shall be void if the insured die by his own hand, or by suicide, except to the extent of any interest acquired by assignment, and the policy is mortgaged along with other property, after which the insured commits suicide, the insurance company is bound to pay the amount to the mortgagee, nor can it come upon other property mortgaged, either for repayment or contribution.[21] Such a provision means a valid and effective assignment, and includes an equitable charge by mere deposit.. Nor is notice of

[16] Terry v. Ins. Co. 15 Wall, 580.

[17] 4 Big. Ins. Cases, 138, Cir. Ct. U. S. Mich.

[18] See also Insurance Company v. Rodel, 95 U. S. 232, where the court declined to instruct the jury that the plaintiff could not recover if the assured knew that the act which he was about to commit would result in death, and deliberately did it for that purpose, and repeated the instructions given in Insurance Co. v. Terry, *supra*. See Scheffer v. Ins. Co., 25 Minn. 534.

[19] Moore v. Conn. Mut. Life Ins. Co.; 4 Big. Ins. Cases, 138.

[20] 109 U. S. 121.

[21] Solictors & Gen. L. Ins. Co. v. Lamb, 10 Jur. (N. S.) 739. Generally as to assigned policies see Cook v. Block, 1 Hare, 390; White v. Brittish Empire Mut. Ins. Co. L. Rep. 7 Eq. 394; Jones v. Consolidated Ins. Co., 26 Beav. 256; Defaur v. Life Ins. Co., 26 Beav., 599; Jackson v. Foster, 5 Jur. (N. S.) 547.

such charge to the insurance office necessary.[22]

Where the policy provided that the insurer should not be liable in case the insured died by his own hand, unless it should have been assigned to other parties for a valuable consideration at least six months before his death, it was held that a letter addressed to a third party charging the policy with a floating balance due him, written three years before the death of the assured by his own hand, came within the exception.[23] So, the deposit of the policy with a creditor, with a letter promising to assign it as a security for his debt upon being required to do so, is such an assignment as contemplated by the policy.[24] So, a deposit of such a policy with the company by which it was issued, as a security for money borrowed, is a good assignment.[25] But an assignment by operation of law is not within such an exception. In order to avoid the effect of the later decisions, some of the insurance companies have added to the clause in their policy, the words "sane or insane." Such words must be definite and unambiguous, in order to be sustained. Thus, where the policy provided that it should be void in case the insured "died by his own hand or act, voluntarily or otherwise," the word "otherwise" was held unmeaning and void.[26] The court will not, in such a case, attempt to measure the degree of insanity. It is enough, for the purpose of relieving the defendant of liability, that the assured took his own life.[27]

CHARLES BURKE ELLIOTT.

Minneapolis, Minn.

[22] Defaur v. Ins. Co., 26 Beav. 599.
[23] Jones v. Investment Co., 26 Beav. 256.
[24] Cook v. Block, 1 Hare 390.
[25] White v. Ins. Co. L. R. 7 Eq. 394.
[26] Jacobs v. National Life Ins. Co., Sup. Ct. District of Columbia, 1874.
[27] Pierce v. Travelers Ins. Co., 34 Wis. 389.

THE NEIGHBOR TO WHOM DUTY IS DUE.

"Who is one's neighbor?" is almost as important a question in the catechism of the law as "What is one's duty towards one's neighbor?" and the answer to it, although not so liberal as that of another Catechism, is in the increase of the complicated relations of life becoming daily more sweeping. The definition of a proprietary neighbor—the proprietor of the *alienum* of the legal maxim—presents no great difficulty, nor is it difficult to put the finger on the person to whom duties are owed in the familiar events of life, such as driving in the street. It is when the idea of contract is mixed up with the question of a liability independent of contract that the lawyer's difficulty arises. The liability of one party to a contract to the other presents no difficulty of this kind, but of late years there have been before the courts many cases raising the question whether a person under an undoubted contractual obligation to another is under a similar duty to all the world, or, if not, to what portion of the rest of his fellow-citizens. In other words, who is the neighbor to whom duty is due? The tendency of modern decisions has been gradually but largely to extend the area of the obligation in this direction. The case of Elliot v. Hall,[1] reported in the October number of the *Law Journal Reports*, is an example of the broader view recently taken by the judges in this matter in obedience to the impetus given by the decision of the Court of Appeal in Heaven v. Pender[2] to the extension of the liability as tort feasors of persons under no contractual liability to the person injured, but under such liability to some one else. In that case, it will be remembered, a workman in the employ of a painter who had contracted to paint a ship for her owner was held entitled to recover damages from the dock company for injuries caused by the staging on which he stood falling by reason of a defect in a rope provided by the company. In the Divisional Court judgment was given for the defendant; but in the Court of Appeal the decision was reversed, the master of the rolls taking a very liberal view of the extent of the responsibilities of persons liable by contract or otherwise for negligence, and Lord Justice Cotton and Lord Justice Bowen preferring to treat the case as within the authority of Indermaur v. Dames.[3] This was the "shaft" case, in which the defendant was held liable on the principle that he was bound to use care in the management of his premises

[1] 54 Law J. Rep. Q. B. 518.
[2] 52 Law J. Rep. Q. B. 702.
[3] 36 Law J. Rep. C. P. 181.

in the interests of persons invited to come upon them. The variety of the facts in this class of cases makes it not easy to attach the circumstances of each to the name of the case, so that they may well have an explanatory addition to their respective titles. Thus, as Langridge v. Levy,[4] has been called the "gun" case; Winterbottom v. Wright[5] the "coach" case; George v. Skivington[6] the "hairwash" case; Elliott v. Hall may be called the "railway truck" case. In all these cases the plaintiff was successful except the coachman who brought an action against the coach builder for injuries due to the breakdown of the wheel. Whether this case, which was so decided in consideration of the necessity of "drawing the line" to prevent an indefinite liability on the part of the maker of an article, will be upheld at the present day, may be open to doubt, and it is contrary to the tendency of the judicial opinion of the day.

In Elliott v. Hall the plaintiff, a workman in the employ of a coal company, had in the course of his duty to unload a truck of coals supplied by the defendant. The truck was hired by the defendant of the Midland Wagon Company, which undertook to do substantial repairs, leaving small matters to be repaired by the defendant. In the bottom of the truck was a trap-door kept in place by a pin, which was itself secured by a catch. The catch was lost, the pin was jerked out of place, and the plaintiff fell through the trap-door with the coals upon him. The jury negatived contributory negligence, and gave the plaintiff £200. In the argument of the case, Heaven v. Pender was relied upon as a conclusive authority. Mr. Justice Grove lays it down that, "there was a clear duty on the defendant to supply an efficient truck, and the plaintiff was the servant of the person to whom the coals were supplied and the person who the defendant might reasonably have supposed would unload the truck." This is the whole reason given by Mr. Justice Grove for his decision, except to comment on Heaven v. Pender in a way to show that the facts of it were not present to his mind. He says that the only question in that case was whether the dockmaster was liable to the plaintiff as well as the person who put up the staging, when in fact the dockmaster was the person who put up the staging. Mr. Justice Smith is equally brief. He says "the plaintiff was not one of the public, not a bare licensee, not a stranger, but a person whose duty it was to unload the truck." So in Winterbottom v. Wright the plaintiff was not a stranger, but the coachman whose duty it was to drive the coach, and yet he was non-suited. In regard to the contention on the part of the defendant, that the duty is limited to occupiers of property, Mr. Justice Smith says, "In the case of Foulkes v. The Metropolitan Railway Company,[7] it was held that there was a duty to the plaintiff, although he had no ticket, since by providing the carriages the company held out an invitation to passengers to use them." But in that case the plaintiff had a ticket, and the Lords Justices were of opinion that a contractual relation existed between the plaintiff and the defendants, although, in the alternative, they considered that the "defendants had invited and re-received the plaintiff" so as to make them liable independently of contract.

Judgments so slenderly supported by reasoning from the previous decisions must have been based on the adoption of the broad principle laid down by the Master of the Rolls in Heaven v. Pender—namely, that "wherever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct in regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill in regard to such danger." We have already (November 17, 1883) given reasons for not accepting this vague test, either as a sufficient rule or useful in itself or as reflecting the cases; and it was not concurred in by Lord Justice Cotton or Lord Justice Bowen, who decided the same case. It may very well be that the decision in Elliott v. Hall is right—the probabilities are that it is, because the circumstances of the case do not seem to carry the liability to

[4] 7 Law J. Rep. Exch. 387.
[5] 11 Law J. Rep. Exch. 415.
[6] 39 Law J. Rep. Exch. 8.
[7] 44 Law J. Rep. C. P. 361.

an unreasonably wide extent—but at present we are sadly in want of a rule which will give us the legal test of the extent of liability in tort, while reconciling Winterbottom v. Wright or overruling it once for all, and with sufficient authority.

THE GREAT RED PEPPER CASE.

Underdale was in a frenzy of excitement. A dastardly outrage had been committed in the very midst of that usually quiet but somewhat dirty village, and there could not be the slightest doubt that the hand of a political agitator had worked the crime. That mystery of iniquity, the radicalism of Birmingham had penetrated even into these parson and squire-ruled precincts, and a political meeting, which the said parson and squire had deigned to honor with their presence, and at which the pompous and portly member for the county was to have explained to the admiring rustics the glories and benefits of the Tory administration, had been nipped in the bud. In the twinkling of an eye the orderly and expectant concourse had been turned into a disorganized mob, and amidst one long and universal sneeze, the school-room was abandoned to the demon of suffocation, who seemed suddenly to have arisen therein. The parson, (who was decidedly "high church") had his cassock torn from his shoulders, the county member's gouty toe was stamped on three several times, and the squire emerged from the crush with an unmistakable black eye.

The physical cause of the catastrophe was plain and patent—some one had thrown a huge dose of cayenne pepper on the stove. Nor was there much doubt in anyone's mind as to who the culprit was. A certain semi-professional agitator, known as "the Colonel" and dwelling in the large neighboring town of Wardley, a hot bed of radicalism and dissent, had been present at the meeting. But no one had observed a suspicious movement on his part. He was not even near the stove, and he certainly appeared to be one of the most violent sufferers. That he had immediately made tracks for home on gaining the open air could not fairly be regarded as an evidence of guilt on his part, as he must have known that his character and record would expose him to vehement suspicion, and however innocent, he could not be expected to wait till the crowd had finished their nasal performances and were free to use their hands. After mature deliberation, therefore, the parson and squire determined to make no charge against him for want of sufficient evidence. The village folk registered many a deep vow of vengeance against the artful villain if he should ever again appear amongst them, but it is needless to say that he displayed no sort of intention of revisiting Underdale till popular opinion had changed.

And here the whole matter appeared about to drop. Decent people condemned with sincere indignation the mean trick of a worthless loafer, though, if of the Liberal persuasion, they could hardly repress a quiet smile at the thought of the summary discomfiture of the rustic big-wigs. One man, however, was determined that the crime should not go unpunished and that he, personally, would chastise the son of Belial. This heroic individual was the village school-master, a very David, of diminutive stature and flaming zeal. He resolved to beard the Philistine in his den, and, proceeding to Wardley, attempted to horsewhip the "Colonel" on his native heath. His enterprise was not a brilliant success. The whip was quickly plucked from his feeble hands and he was packed off home, not without one or two slight bruises, the unavoidable results of a personal encounter with a man twice his size. Hereupon he instantly took out a summons for assault and battery and the seat of war was transferred from the remote precincts of Underdale to the more metropolitan locality of Wardley.

The judicial authority of Wardley was vested in the hands of some fifteen or twenty borough magistrates, who sat in regular rotation, five together, three times a week. They were honest, respectable men of impartial intentions, where politics were not concerned—but all Tories. The oldest inhabitant could scarcely remember the day when a tory sat as member for Wardley, and yet the borough bench still remained the exclusive property of that party, partly through the negligence of Liberal governments, who bestowed little attention on a constituency too faithful to resent neglect, and partly from the fact that the Liberal strength lay principally amongst

the working classes and the lesser trades-people, small fry, not heavy enough to bear the substantial dignity of a J. P. on their shoulders. When, therefore, the school-master determined to lay his griefs before the local magistracy, he had little reason to doubt a final triumph. When it was further announced that the Conservative Association had taken up his case and had retained the most formidable attorney in the district to prosecute, the Liberals began to feel that the affair was getting very like a persecution, and whilst by no means proud of their man, yet determined to see him through. Their secretary therefore placed the defence in the hands of a young lawyer who was fast becoming known as a successful advocate and who had, moreover, the qualities essential in such a case as this, of unlimited "nerve" and great irreverence for constituted authority. To escape conviction was impossible. Five average Wardley Tories, or, for the matter of that, five average Wardley Liberals, would find Abel guilty of the murder of Cain, if politics were involved, and here was a matter where even an impartial man might find grounds to convict. The only thing to be done was to make as much political capital out of the affair as possible and compel the magistrates either to listen to some very plain talk about Tories in general and local Tories in particular, or to lay themselves open to the denunciations of the borough press for having "gagged the defendant's advocate," "stifled liberty of speech," etc., etc. We may remark by way of parenthesis, that an English attorney always feels very independent and masterful before a borough bench. As a professional man, he is the equal in social standing of any of the men before whom he is pleading, and, unless they happen to be his personal friends, cares not one straw for their good will or their anger.

On the appointed day, the police court was of course crowded. On the bench the magistrates whose term of duty it was, were supported by most of their brethren; one or two county magistrates were also present, amongst them the Underdale squire. He took occasion to remark that he was not there with the intention of acting judicially, to which he received the curt retort from the Liberal lawyer, that, as he had no jurisdiction in the borough, he had no business on the bench, and, in fact, would have shown more decency in staying away. This, of course, led to a preliminary wrangle, and had the result of making al the magistrates very ferocious. The prosecuting attorney himself, old hand as he was, got a little angry and consequently examined his client with rather less than his wonted skill. In cross-examination, the little schoolmaster completely broke down. He admitted that he commenced the affray by a premeditated attack and that the defendant only used sufficient force to drive him away, closing with a picturesque account of the red pepper incident, so dolefully given that one or two of the magistrates even could not repress a smile and the crowd in the court house roared with delight. Cheered by this unexpected success, the defendant's attorney suddenly changed his tactics, and, instead of the red hot speech he had prepared, addressed the bench in a quiet matter of fact way, pointing out, what could not be gainsaid, that there was absolutely no case made out and that the defendant was entitled to an immediate acquittal. To close the whole affair, he declared that he would put the defendant himself in the box and his learned friend could cross-examine him to his heart's content. But his learned friend by no means appreciated the proffered privilege and strenuously objected that the defendant was not competent to give testimony. He knew the "Colonel" to be a keen, unscrupulous and practiced witness and felt that even his searching questions would be rained in vain upon such an old intriguer. After much debate, the bench, on the advice of their clerk, though sorely against their will, decided to admit the evidence. They could not, in fact, do otherwise, as time and again defendants had been heard without objection in cases of assault. Accordingly the "Colonel" mounted the witness stand, and after a short examination upon the actual facts of the case, was handed over to the tender mercies of his opponent. S. was in a dilemma. Had he possessed any definite information on which to work, any specific facts upon which he could hope afterwards to catch his man in perjury, he would, undoubtedly, have attacked him with all his accustomed vigor and skill; but failing this, he chose discretion as the better part of valor, and declared he had no questions to ask,

adroitly insinuating that it would be a mere waste of time to question a man whom nobody would believe.

The case being ended, the magistrates of course did their part of the work, convicting the defendant and imposing upon him the heaviest fine in their power,—forty shillings, if we remember rightly. The paltry sum was instantly paid, and the Liberals retired jubilant at the admirable specimen of magisterial injustice thus provided for denunciation and at the large political returns which the few pounds spent on the trial would bring in. The poor school-master got more kicks than halfpence, being roundly abused by his own party for his failure in the witness-box. A course of reflection upon the ingratitude of political friends subsequently converted him into a Liberal, a conversion which somehow coincided with his removal from Underdale to a mastership in a dissenting school at Wardley, whilst the "Colonel," by accounts received only the other day, is now reaping a golden harvest as a conservative registration agent and stump speaker, in view of the approaching elections. A. B. M.

PROBATE PRACTICE — APPORTIONMENT OF FEES OF TWO ADMINISTRATORS

MOUNT v. SLACK.*

New Jersey Prerogative Court, October Term, 1884.

JURISDICTION. [*N. J. Orphans Court.*] *Cannot Apportion Fees between Administrators.*—After the account of two administrators, allowing commissions in a gross sum to both, had been passed, one of them, alleging that his co-administrator had possessed himself of all the commissions, filed a petition in the orphans court to compel his co-administrator to pay him one-half thereof—*Held*, that the orphans court had no jurisdiction to grant the order.

Appeal from order of Middlesex orphans court.

Mr. G. O. Vanderbilt, for appellant; *Mr. C. T. Cowenhoven*,, for respondent.

RUNYON, Ordinary. [Omitting an immaterial point.]

The order appealed from is one dismissing the petition of the appellant, as one of the two administrators of the estate of Enoch Mount, deceased, for an order of the orphans court requiring his co-administrator, the respondent, to show cause why he should not pay to the appellant one-half of the commissions allowed to them upon the passing of their joint account as such administrators. The petition, it may be observed, did not pray for an order requiring the respondent to pay, but to show cause why he should not pay. It was treated, however, as an application for an order requiring him to pay half of the commissions to the appellant. The court granted the order to show cause, and on hearing it, dismissed it and the petition on the ground of want of jurisdiction. The application was based on the one hundred and twelfth section of the orphans court act (Rev. p. 776), which provides that where any difference arises between executors, administrators, guardians or trustees in regard to the proportion of commissions between them, the orphans court shall determine the same, having regard to their respective services. No difference arose on the passing of the account as to the proportion of commissions which each administrator should receive, but the commissions were allowed (so far as appear, without objection) in a gross sum to both. The application under consideration was an attempt by the appellant to compel his co-administrator to pay him his share of them. The petition alleged that the latter had possessed himself of the whole amount, and refused to pay the petitioner his share. The above-quoted section of the act confers no jurisdiction upon the orphans court to compel payment by one administrator to another of his share of the commissions allowed in gross to both. It is obvious that the section referred to gives the court no jurisdiction over such a suit. The differences to which it relates are only such as arise in regard to the proportion of the commissions to which each of several executors, administrators, guardians or trustees may be entitled in respect of his services, and are to be adjusted by the adjudication of the court on the passing of the account. The proceeding under review was not in form, nor was it in effect, an application to open the account for fraud or mistake in regard to the commissions. Neither fraud nor mistake was alleged. Nor was it an application to review in any way on any ground the decision of the court as to the commissions. No complaint was made of its award in that respect There is no error in the order appealed from. It will be affirmed, with costs.

*S. c., 39 N. J. Eq. 230 (Adv. Sheets).

NOTE.—Where there are several executors or administrators, they are entitled jointly to no more for their services than what would be an adequate compensation to one, Phillips v. Richardson, 4 J. J. Marsh, 212, 214; Savage v. Sherman, 24 Hun 307; Walker's Estate, 9 Serg. & R. 223; Valentine v. Valentine, 2 Barb. Ch. 430.

Where there are two executors, and the will fixes the commission of one, the court can only allow one-half the maximum rate to the other, Lee v. Lee, 6 Gill & J. 316; Edward's Succession, 34 La. Ann. 216; Secor v. Sentis, 5 Redf. 570; Oden v. Windley, 2 Jones Eq. 440; Guien's Estate, 1 Ashm. (Pa.) 317.

Where an executor, qualified and offered to act eighteen years after the testator's death, but the other two executors, who had duly qualified, retained the

estate—*Held*, that he was not entitled to commissions, Walke v. Hitchcock, 5 Redf. 217.

In Lemmon v. Hall, 20 Md. 168, the allowance of the maximum commission fixed by statute, to an administrator, was held not to deprive an administratrix *de bonis non* after his death of full commissions on the balance remaining in the administrator's hands.

In Schoeneich v. Reed, 8 Mo. App. 356, 363, an executrix made no claim for commissions, and it was held that her co-executor was entitled to the full amount.

Ordinarily, commissions should be equally divided, where there are several executors, Squier v. Squier, 3 Stew. Eq. 627; Bohde v. Bruner, 2 Redf. 333; Van Nest's Estate, 1 Tuck. 130; Seitz's Case, 6 Mo. App. 250; but, where one has performed more than his share of the work, the court may allow him a proportionate share of the commissions, Smart v. Fisher, 7 Mo. 580; Grant v. Pride, 1 Dev. Eq. 269; Hodge v. Hawkins, 1 Dev. & B. Eq. 564; Walker's Estate, 9 Serg. & R. 223; Valentine v. Valentine, 2 Barb. Ch. 430; Huggins v. Rider, 77 Ill. 360; Hill v. Nelson, 1 Dem. (N. Y.) 357; but see Richardson v. Stansbury, 4 Harr. & J. 275.

On the death of one of two executors, both of whom had undertaken the trust, the survivor was held not entitled to commissions on that part of the estate in his deceased co-executor's hands, Perry v. Maxwell, 2 Dev. Eq. 488.

If all the commissions are allowed to one of two executors, the legatees cannot object, Claycomb v. Claycomb, 10 Gratt. 589; Stephenson v. Phillips, 1 Zab. 70.

An agreement between two executors that one should receive two-fifths of the commissions charged by the other, who settles a separate account, is not illegal, if it appear that the former has transacted part of the business of the estate, Aston's Estate, 5 Whart. 228; Brown v. Stewart, 4 Md. Ch. 368.

Where an administrator etc. resigns, the amount of his commissions must be equitably adjusted by the court, relative to the amount of his services, and what still remains to be done. Ord v. Little, 3 Cal. 287; Marvin's Case, Myrick (Cal.) 163; Day's Case, 3 La. Ann. 624; Cherry v. Jarratt, 25 Miss. 221; but see Jones's Case, 4 Sandf. Ch. 615; Moffatt's Case, 24 Hun 327; or where he dies, Milne's Succession, 1 Rob. (La.) 401; McPherson v. Agnew, 5 Gill & J. 60; Parker v. Gwynn, 4 Md. 423; Selby v. Selby, 1 Bland. 149, note; Effinger v. Richards, 35 Miss. 540; Perry v. Maxwell, 2 Dev. Eq. 488, 507; Corbin v. Howell, Bail. Eq. 183; Turner v. Turner, 1 Gratt. 11; Lay v. Lay, 10 S. C. 208; but where a guardian dies, his administrator is not entitled to commissions for paying over the ward's funds to the new guardian, Floyd v. Priester, 8 Rich. Eq. 248; see Adams v. Latham, 14 Rich. Eq. 304; nor are surviving executors entitled to commissions on a sum paid to the representative of a deceased co-executrix for arrears of commissions due her, Betts v. Betts, 4 Abb. N. C. 324, 438; nor the administrator of a deceased executor paying over the moneys of the testator in the intestate's hands to a surviving executor, Griffin v. Bonham, 9 Rich. Eq. 71; or, where the administrator etc. is removed, Spratt v. Baldwin, 33 Miss. 581, 34 Miss. 327; Barton's Estate, 55 Cal. 87; Fournier v. Ingraham, 7 Watts & S. 27; see Rice's Succession, 14 La. Ann. 317; Foley v. Egan, 13 Abb. Pr. (N. S.) 361, note; or, where, having partly administered, he removed from the jurisdiction of the court, Berry's Case, 1 Bland, 149, note; or, where a sale of lands made by him had been set aside, without any blame having been imputed to him, and afterwards his successor sold the same property, Lawson v. State, 1 Bland, 149, note.

The orphans court has no power in Pennsylvania to apportion the commissions, where there are conflicting claims by different executors as to the amount due each one, Davis's Estate, 1 Phil. 360; see Wickersham's Appeal, 64 Pa. St. 67; Stevenson's Estate, Pars. Eq. 18; *aliter*, in Alabama, Carver v. Hallet, 26 Ala. 722.

An action at law will not lie by one executor against another, after an order of the orphans court has fixed the amount due to the plaintiff, Carver v. Hallett, 26 Ala. 722; Hope v. Jones, 24 Cal. 89; nor, before such order apportioning the commissions, White v. Bullock, 4 Abb. App. Dec. 578, reversing 20 Barb. 91.

An action of debt to recover one-half the commissions was held to lie by one administrator against another, who had received them all, Bush v. McComb, 2 Houst. 546; or *assumpsit*, Richardson v. Stansbury, 4 Harr. & J. 275; or, a bill in equity, Walton v. Erwin, 1 Ired. Eq. 136.

JOHN H. STEWART.

Trenton, N. J.

CONTRACTS AGAINST PUBLIC POLICY.

HERMAN v. ZEUCHNER.*

English Court of Appeal, 1885.

CONTRACT. [*Validity—Public Policy.*] *Indemnifying one for Becoming Surety in a Criminal Bail Bond.*—Plaintiff was convicted of a misdemeanor, and was ordered to find security for his good behavior for two years, and imprisoned in default. Defendant then agreed to become surety in consideration of plaintiff depositing with him a sufficient sum to cover his liability, which sum was to remain in defendant's hands for the two years. The money was handed over to defendant, who executed a bail-bond, and plaintiff was released. Before the expiration of the two years plaintiff sued defendant to recover the money which he had handed over. *Held*, (reversing the judgment of Stephen, J., that the agreement under which the money was deposited, being an agreement to indemnify bail in a criminal case, was contrary to public policy, and illegal, and therefore the maxim, "*In pari delicto potior est conditio possidentis*" applied, and plaintiff was not entitled to recover. Wilson v. Strugnell, (45 L. T. Rep. N. S. 219; 7 Q. B. Div. 548), overruled.

This was an action brought to recover the sum of £49 under the following circumstances:—

The plaintiff had been convicted of keeping a disorderly house, and had been ordered to find two surities for his good behavior for two years. He was unable to find more than one surety, and was therefore imprisoned in default. He thereupon requested the defendant to become surety for him. This the defendant refused to do unless the amount of the bond was deposited with him, to remain in his hands for the two years during which he would be liable as surety. Accordingly the sum of £49 was handed over to the defendant, who then executed the bail-bond as surety. The plaintiff was then released. Afterwards, before the two years had expired, the plaintiff commenced the present action to recover the £49 which he had handed over to the defendant under the circumstances above stated.

Stephen, J., before whom the case was tried

S. C., 53 L. T. (N. S.) 94. Reported by P. B. Hutchins, Esq., Barrister-at-Law.

without a jury, gave judgment for the plaintiff, and from this judgment the defendant now appealed.

Cock for the defendant, in support of the appeal.—The learned judge thought that he was bound by his own decision in Wilson v. Strugnell (45 L. T. Rep. N. S. 219; 7 Q. B. Div. 548), and gave judgment in favor of the plaintiff, on the ground that the contract was illegal, and had not been executed, and therefore the plaintiff was entitled to repudiate it, and recover the money which he had paid in pursuance of it. Assuming that decision to be on all fours with the present case, it cannot be supported. Even if this is an illegal contract, it is an executed contract, for the agreement between the parties was not that the defendant should pay the amount of the bail, which he might be called on to do at any time during the two years, but only that he should enter into the bond. If he had been called upon to pay the money it would not have been paid in pursuance of the agreement. The contract then having been executed, the maxim *In pari delicto potior est conditio possidentis* applies, and this action cannot succeed. The present case is governed by Taylor v. Chester (21 L. T. Rep. N. S. 359; L. Rep. 4 Q. B. 309), and the cases of Bone v. Eckless (5 H. & N. 925; 29 L. J. 438, Ex), and Taylor v. Bowers (34 L. T. Rep. N. S. 938; 1 Q. B. Div. 291) are not applicable. [Bowen, L. J. referred to Tappenden v. Randall (2 B. & P. 467), and Brett, M. R. referred to Simpson v. Bloss (7 Taunton, 246.] Moreover, this contract is not against public policy (Cripps v. Hartnoll, 4 B. & S. 414; 32 L. J. 381 Q. B.). If this is so, it is clear that the plaintiff is not entitled to recover, having brought his action before the expiration of the period of two years, during which it was agreed that the money should remain in the defendant's hands. [Brett, M. R. referred to Jones v. Orchard (16 C. B. 614, 24 L. J. 229, C. P.]

Stanley Boulter for the plaintiff.—The contract was clearly illegal, and cannot be said to have been executed before the two years had expired The case of Wilson v. Strugnell (45 L. T. Rep. N. S. 219; 7 Q. B. Div. 548) is exactly in point, and that decision is good law, and ought to be upheld.

BRETT, M. R.—The first question to be considered is, what makes a contract, by which I mean a contract not under seal? There must be a consideration which is to performed by one party, and a promise which is to be performed by the other party. A contract is illegal if either the consideration or any part of the consideration, or the promise, or any part of the promise, is illegal. Now the whole of the contract in the present case is this. The plaintiff asked the defendant to enter into a bail bond to bail out the plaintiff who had been convicted on a criminal charge, and ordered to find security, and the plaintiff agreed, if the defendant would enter into the bond, to deposit with the defendant a sum of money which was to remain in the defendant's hands for two years. The promise, therefore, was that the defendant would enter into the bond, and the consideration was the deposit of the money, and the question is whether either of these is illegal. This depends on whether it is illegal to bail out a person on a criminal charge in consideration of receiving money in hand sufficient to meet the bond. I am of opinion that this is illegal, because the effect is to take away from the authority of the law the protection which is intended to be given when sureties are required. The reason for requiring sureties is that it makes it the interest of the sureties to take care that the principal obeys, and does that which he is called upon to do. If the principal puts into the hands of the surety the means of meeting the bond when the principal breaks his promise, then the surety has no such interest as I have mentioned, and the contract is illegal. It follows, therefore, that a part of the contract in the present case is illegal. The plaintiff now sues to get back the money which he has deposited, and the first objection by which he is met is, that if this contract is legal he has brought his action too soon and cannot recover. This is clearly so, and therefore the only way in which the plaintiff can recover is by showing that the contract is illegal. It is further contended that the plaintiff cannot recover on the ground that the whole contract has been fulfilled, because the money has been paid and the bond has been executed by the defendant. I give no opinion as to whether it is necessary to determine that the contract has been wholly fulfilled in order to arrive at the conclusion that the action will not lie, but it seems to me to be beyond dispute that if the contract is illegal, and the whole of it is executed, the person vouching the illegality cannot recover, and I am of opinion that in the present case the whole contract is executed. I only differ from Stephen, J. in this, that he thought the whole of the contract was not executed, whereas I think the whole was executed. Stephen, J. expressed an opinion, both in the present case and in Wilson v. Strugnell (45 L. T. Rep. N. S. 219; 7 Q. B. Div. 548) that if the whole contract were executed the action would not lie, but he thought that payment of the money was a part of the contract. I do not agree with this view. The defendant never contracted with the plaintiff to pay the money. It is the law that would made him pay, and it makes no difference to the plaintiff whether the defendant pays or not. I think the plaintiff in this case could not recover even after the expiration of the two years. I do not agree with the decision in Wilson v. Strugnell (*ubi sup.*), and I am of opinion that the judgment now appealed from ought to be reversed.

BAGGALLAY, L. J.—I am of the same opinion. The plaintiff has paid money on a consideration which is against public policy, and therefore illegal, so I think the maxim *In pari delicto potior est conditio possidentis* governs the case.

In delivering the judgment of the Court in Taylor v. Chester, Mellor, J. said: "The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party:" (L. Rep. 4 Q. B. at page 314). This statement applies to the present case, for to prove his case the plaintiff must show that he was a party to the illegality, and therefore I think the defendant is entitled to judgment. It is not necessary to consider the case of Wilson v. Strugnell (*ubi sup.*) in detail. Stephen, J., there went into the distinction as to whether the purpose had been carried out or not. As at present advised I am not prepared to go the full length of holding that it is necessary that the contract should have been fully executed in order to show that the action cannot succeed.

BOWEN, L. J.—I agree. It is unnecessary to decide whether the contract must have been completely executed in order to afford an answer to the action.

Appeal allowed.

NOTE ON THE VALIDITY OF CONTRACTS WHICH TEND TO OBSTRUCT THE ADMINISTRATION OF JUSTICE.—The position taken by the master of the rolls in the principal case, that "it is illegal to bail out a person on a criminal charge in consideration of receiving money in hand sufficient to meet the bond, * * * because the effect is to take away from the authority of the law the protection which is intended to be given when sureties are required," leads us naturally to the general statement that whenever the consideration of an agreement is the doing or forbearance of an act which tends to obstruct or impede the administration of public justice, it is illegal, as opposed to public policy, and the contract cannot stand. Thus, a bond given to a third person for the purpose of influencing the action of an alderman in the discharge of his duties is void.[1] And generally, an agreement to indemnify a sheriff, constable, or other officer, for an act to be done by him in plain violation or neglect of his official duty cannot be sustained.[2] Nor a promise to pay him a compensation greater than that allowed by law for his services.[3] There is some difference of opinion as to whether a valid consideration can arise from a promise to obtain a pardon, from the executive, for a person under sentence for a crime; but the more approved view seems to be that such an engagement is not unlawful if the parties do not contemplate a resort to any sinister or illegal means.[4] But all agreements for the suppression or perversion of evidence in a pending suit, or for the manufacture of testimony to a particular point, are clearly against public policy and void.[5] So also a promise to pay a witness a fee greater than that allowed by law, in case the testimony given by him shall enable the plaintiff to succeed in his action, is a fraud upon the courts and illegal.[6] But where the debtor justly owes the creditor, and promises to pay him out of money which he expects to recover in a pending suit against a third person, if the creditor will wait till that time, it does not invalidate the agreement that the debtor afterwards examines the creditor as a witness in that suit.[7]

It is of the highest importance to public justice and the welfare of the state that crimes should be investigated and punished; and any contract which has for its consideration the abandonment or stifling of a criminal prosecution is utterly void.[8] And it is strongly urged that there is no longer any distinction, in this respect, between felonies and misdemeanors.[9] But it may still be regarded as good law that where the prosecution is cirminal in form only, or where the injury complained of is of a purely private and personal nature, in no way involving the interests of the public, an agreement for its settlement is not invalid.[10] In many of the States, for example, prosecutions for bastardy are regarded merely as a species of civil action, though criminal in form, and therefore their discontinuance will furnish a good consideration for a pecuniary settlement or compromise.[11]

But, since public policy is in no way concerned with the option which a man has to sue or to forbear suit, it is universally held that a good consideration may spring from an agreement to refrain from prosecuting a civil claim.[12] For instance, forbearance to contest a will is sufficient to support a promise to pay money.[13] Still, the public interests may become involved in a mere private controversy, and in that case the rule under consideration must be applied. Thus, it is held that an agreement to withdraw a plea of usury is against public policy and void.[14] And the same is true of divorce proceedings, which (to adopt Mr. Bishop's epigram), are "triangular actions of tort," the State being the third party. Hence, an agreement that the defendant in an action for divorce shall withdraw his or her papers and make no defence is illegal and void.[15] And so also notes or other securities given in consideration of a promise that the payee will make no opposition to the discharge of the maker in bankruptcy

1 Cook v. Shipman, 24 Ill. 614.

2 Webber v. Blunt, 19 Wend. 188; Denney v. Lincoln, 5 Mass. 385; Shotwell v. Hamblin, 23 Miss. 156; Goodale v. Holbridge, 2 Johns. 193; Hodsdon v. Wilkins, 7 Greenl. 113.

3 Downs v. McGlynn, 2 Hilton (N. Y. C. P.), 14.

4 Chadwick v. Knox, 31 N. H. 226; Formby v. Pryor, 15 Ga. 258; Hatzfield v. Gulden, 7 Watts, 152; Kribben v. Haycraft, 26 Mo. 396.

5 Valentine v. Stewart, 15 Cal. 387; Badger v. Williams, 1 D. Chip. 137; Patterson v. Donner, 48 Cal. 369.

6 Dawkins v. Gill, 10 Ala. 206; Pollak v. Gregory, 9 Bosw. 116; Dodge v. Stiles, 26 Conn. 263; Willis v. Peckham, 1 Br. & B. 515.

7 Grove v. McCalla, 21 Pa. St. 44.

8 Clubb v. Hutson, 18 C. B. N. S. 414; Collins v. Blantern, 2 Wils. 347; Henderson v. Palmer, 71 Ill. 579; Commonwealth v. Pease, 16 Mass. 91; Pierce v. Kibbe, 51 Vt. 559; National Bank v. Kirk, 90 Pa. St. 49; Armstrong v. Southern Ex. Co., 4 Baxt. 376; McMahon v. Smith, 47 Conn. 221; Riddle v. Hall, 99 Pa. St. 116; Shaw v. Reed, 30 Me. 105.

9 1 Wharton on Contrs., § 484.

10 Geier v. Shade (Sup. Ct. of Pa., 1885), 20 Reporter, 153; Soule v. Bonney, 37 Me. 128; Breathwit v. Rogers, 32 Ark. 758.

11 Hoit v. Cooper, 41 N. H. 111; Davis v. Moody, 15 Ga. 175; Colman v. Francia, 3 Scam. 378; Holcomb v. Stimpson, 8 Vt. 141; Hinman v. Taylor, 2 Conn. 357.

12 Muirhead v. Kirkpatrick, 21 Pa. St. 237; Wyatt v. Evins, 52 Ala. 285; Stewart v. Ahrenfeldt, 4 Denio, 189; Heaps v. Dunham, 95 Ill. 583; Boone v. Boone, 58 Miss. 820.

13 Palmer v. North, 35 Barb. 282; Hindert v. Schneider, 4 Ill. App. 203.

14 Clark v. Spencer, 14 Kans. 398.

15 Stoutenburg v. Lybrand, 13 Ohio St. 228; Sayles v. Sayles, 21 N. H. 312; Kilborn v. Field, 78 Pa. St. 194; Hamilton v. Hamilton, 89 Ill. 349.

are void.[16] But before proceedings in bankruptcy have been commenced, a creditor may take from a third person a security as an inducement to forbear instituting bankruptcy proceedings against his debtor.[17] And in this connection we may refer to the case of Coppock v. Bower,[18] which further illustrates the general principle that controversies between individuals may concern the public. It appeared that one who had presented a petition to parliament against the return of a member, based on allegations of bribery, had greed, for a money consideration, to drop the proceedings; and it was held that an action would not lie on such a contract.

While the law undoubtedly favors the submission of disputes to arbitration, yet if an agreement to submit matters in controversy is couched in such terms as to oust the superior courts of their jurisdiction, it must be regarded as contrary to public policy.[19] So of an agreement that the party will not remove any suit which may be commenced against him in a state court to the federal courts.[20]

The case of Jones v. Orchard (referred to by Brett, M. R., in the course of the argument, *supra*), illustrates an important distinction from the principal case. It also originated in a criminal action, but the recognizance was for the appearance of defendant and the payment of costs, and the bail was forfeited and paid by the surety. It was held that the latter might maintain an action against the defendant for the amount of the costs; for, as it was not contrary to public policy for, the defendant to indemnify his bail against the cost of the prosecution, the law would imply a promise to that extent; thought the court thought that an agreement by the defendant to indemnify his bail against the consequences of his non-appearance would be against public policy.[21] H. C. BLACK.

[16] Austin v Markham, 44 Ga. 161; Baker v. Matlack, 1 Ashm. (Pa.) 68; Fulton v. Day, 19 Reporter, 735; Dexter v. Snow, 12 Cush. 594; Simmons v. West, 2 Miles (Pa.) 196.

[17] Ecker v. Bohn, 45 Md. 278.

[18] 4 Mees. & W. 361.

[19] Horton v. Sayer, 4 Hurl. & Nor. 643; Stephenson v. Piscataqua Fire Ins. Co., 54 Me. 55; Austin v. Searing, 16 N. Y. 112.

[20] Home Ins. Co. v. Morse, 49 How. Pr. 314; s. c. 20 Wall. 445.

[21] Jones v. Orchard, 32 Eng. Law & Eq. 485. The case of Dunkin v. Hodge, 46 Ala. 523, is very similar to the principal case.

WEEKLY DIGEST OF RECENT CASES.

1. CHATTEL MORTGAGE. [*Description.*] *"Forty-one Berkshire Hogs, and Sixty-five Grain Sacks" not Sufficiently Certain.*—The description of property in a chattel mortgage as "Forty-one Berkshire hogs and sixty-five grain-sacks" is not so uncertain as to invalidate the mortgage. [To this decision the learned editor of the *Northwestern Reporter*, Mr. Robertson Howard, has appended a valuable note, citing the following illustrative cases: Griffiths v. Wheeler, 2 Pac. Rep. 842; Muir v. Blake, 11 N. W. Rep. 621; Tolbert v. Horton, 22 N. W. Rep. 126; Yant v. Harvey, 7 N. W. Rep. 675; Harris v. Kennedy, 4 N. W. Rep. 651; McVay v. English, 1 Pac. Rep. 795; Muse v. Lehman, 1 Pac. Rep. 804; Corbin v. Kincaid, 7 Pac. Rep. 145: Senter v. Mitchell, 16 Fed. Rep. 20; Melin v. Reynolds, 19 N. W. Rep. 81; Manor v. Sheehan, 15 N. W. Rep. 687; Tabor v. Sampson, 4 Pac. Rep. 45; Everett v. Brown, 20 N. W. Rep. 743; Hayes v. Wilcox, 17 N. W. Rep. 110; Eggert v. White, 13 N. W. Rep. 426; Muir v. Blake. 11 N. W. Rep. 621; Pennington v. Jones, 10 N. W. Rep. 274; Fowler v. Hunt, 4 N. W. Rep. 481; Clay v. Currier, 17 N. W. Rep. 760; Adams v. Commercial Nat. Bank, 5 N. W. Rep. 619.] *Knapp v. Dietz*, S. C. Wis., Sept. 22, 1885; 24 N. W. Rep. 471.

2. CIVIL PROCEDURE. [*Trials — Evidence— Bastardy.*] *Exhibition of Child to Jury.*—On the trial of an issue respecting the parentage of a bastard child, it is error to allow the child to be exhibited to the jury for the purpose of showing a supposed likeness between it and the defendant. [In giving the opinion of the court on this point, Taylor, J., said: "Upon the question of the propriety of exhibiting the child to the jury as evidence in cases involving its paternity, the decisions are not in harmony. In North Carolina, the Supreme Court of that State hold that such exhibitions may be properly made. See State v. Woodruff, 67 N. C. 89; State v. Britt, 78 N. C. 439; Warlick v. White, 76 N. C. 175; and State v. Bowles, 7 Jones (N. C.) 579. The same was held by the Supreme Court of Iowa in State v. Smith, 54 Iowa, 104; s. c., 6 N. W. Rep. 153. In this last case the child was over two years old; but in the case of State v. Danforth, 48 Iowa, 43, the same court held it was improper to exhibit to the jury a child only three months old. In Eddy v. Gray, 4 Allen, 435; Jones v. Jones, 45 Md. 144; Keniston v. Rowe, 16 Me. 38, the court hold that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible, and in Reitz v. State, 33 Ind. 187, and Risk v. State, 19 Ind. 152, it was held error to allow the prosecution to give the child in evidence, so that the jury might compare it with the defendant who was present in court. In the Douglas Case, Lord Mansfield is reported as saying: 'I have always considered likeness as an argument of a child's being the son of a parent: and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things, whereas a family likeness runs generally through all these, for in everything there is a resemblance; as of features, size, attitude, and action.' This language attributed to Lord Mansfield is taken from Wills on Circumstantial Evidence, p. 123. This author, on the next page, says that in a Scotch case, when the question was, who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of Jones v. Jones, *supra*, the learned judge who wrote the opinion refers to the language used by Lord Mansfield in the Douglas Case, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts; and he quotes with approval the language of Justice Heath in the case of Day

v. Day, decided in 1797, in which the learned judge stated to the jury 'that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence.' The learned judge in the case of Jones v. Jones, *supra*, in disapproving of the language used by Lord Mansfield, says: 'We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist.' It should be remembered that in the Douglas Case, and the Maryland case, the question of parentage was as to a person who was full grown. So that if there is anything certain in family likeness it would be fully developed, and if in any case such claimed likeness could be considered by a jury in determining the question of parentage, it would be in a case of that kind. In the case of Jones v. Jones, the court seemed to be of the opinion that, 'when the parties are before the jury, and they can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered.' In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there be any. And when applied to the immature child its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury. The learned author of 'Beck's Medical Jurisprudence' says: 'It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is, however, a circumstance connected with this which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is a negro.' In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father. Warlick v. White, 76 N. C. 175. In a case like the one at bar, we think no exhibition should be made. Justice Lyon, in the case of Washburn v. Railroad Co., 59 Wis. 364-370, s. c., 18 N. W. Rep. 328, says: 'To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefits of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or the grounds of such opinions cannot be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts when all the evidence is before it, and there is none whatever to support the judgment.' This reasoning clearly shows the impropriety of permitting the jury to base their judgment, in whole or in part, upon their inspection of the child exhibited to them in court. If the child itself, when presented to the jury for inspection, is or may be evidence tending to prove its parentage, then this court upon appeal could not reverse their verdict, although the written bill of exceptions entirely fail to support such verdict, for the reason that this court would not have before it all the evidence in the case upon which the jury acted."] *Hanawalt v. State*, S. C. Wis., Sept. 22, 1885; 24 N. W. Rep. 489.

3. CIVIL PROCEDURE. [*Trials — Misconduct of Counsel—New Trial.*] *Quoting to the Jury an Admission Made by the Opposing Counsel while Drunk.*—During the progress of a trial one of the plaintiff's counsel made an important admission, while drunk, not intending it to be used before the jury; but defendant's counsel quoted it in his argument to the jury as an admission and the court, though requested, refused to stop him. It was held that the court should have admonished the jury that the statement was not in evidence, and should, if requested, have discharged the jury, and the judgment was accordingly reversed. In the opinion of court, Pryor, J., said: "The remark was made by the attorney to the attorney for the defendant but was not intended for the jury, nor does the record show that it was heard by them. The admission, if true, determined the case for the defense and adversely to the facts represented by the attorney making it. It was not evidence for either party and the court should not only have admonished counsel that it was an improper use of the admission made, but under the circumstances ought to have discharged the jury, if desired by counsel for the plaintiff. There was testimony supporting each side of the issue, and so conflicting in its character as to leave but little doubt as to the effect of such a statement on the mind of the jury. The high character of counsel making the argument would indicate that no wrong was intended, but this court must adjudge that under the circumstances the plaintiff's case must have been greatly prejudiced by reason of the statement made, and for that reason should be reversed." *Houston v. Kidwell*, Ky. Ct. App., Sept. 26, 1885; 7 Ky. Law Repr. 204.

4. ——— ———. [*Expert Testimony.*] *Principles on which Hypothetical Questions are put to Expert Witnesses.*—In propounding a hypothetical question to an expert a party may assume as proved all the facts which the evidence tends to prove, and the court should not reject the question on the ground that in his opinion such facts are not established by a preponderance of the evidence, [In giving the opinion of the court Taylor, J., said: "It is also assigned as error by the counsel for the appellant that the court refused to allow the expert witnesses to answer certain hypothetical questions proposed by the defendant on the trial. As to the propriety of allowing expert witnesses to give an opinion upon a hypothetical case stated, the practice has frequently been approved by this and other courts. See Luning v. State, 2 Pin. 215-220; Wright v. Hardy, 22 Wis. 339; Bennett v. State,

57 Wis. 69; s. c. 14 N. W. Rep. 912; Hunt v. Lowell, G. L. Co. 8 Allen, 169; Kempsey v. McGinniss, 21 Mich. 123; Woodbury v. Obear, 7 Gray, 467. And it is clearly a more appropriate way than to allow the expert witness who may have heard the evidence in the case to give his opinion upon his understanding of the evidence so given. The reason for permitting hypothetical questions to be propounded to an expert witness, rather than to allow him to give his opinion from hearing the evidence given in court and basing an opinion upon that, was stated by this court in Bennett v. State, *supra*, pp. 85, 86. The reasons are stated as follows; 'It is almost impossible that all the testimony given in the case, coming from many witnesses and elicited by a long examination, should be entirely uncontradictory, or should be so plain that different inferences would not be drawn by different men. And to permit an expert to give his opinion, which is to go to the jury as competent evidence, upon such a mass of testimony, without any explanation as to what state of facts such an opinion is based upon, is, in effect, taking the case from the jury and deciding it upon the understanding of the witnesses as to what facts the evidence in the case established. We think the better rule is that the jury should be clearly informed of the exact state of facts upon which the expert bases his opinion, and they certainly are not so informed when he gives his opinion upon his recollection and understanding of the whole evidence in the case; and this is especially so where the evidence is voluminous, is elicited from a large number of witnesses, and is not entirely harmonious and uncontradictory. The jury should in every case distinctly understand what are the exact facts upon which the expert bases his opinion. This is perhaps, better accomplished by limiting him to answering hypothetical questions, and if it be proper, in any case, to permit an expert who has heard the testimony of a particular witness or of all the witnesses to give his opinion upon such evidence, and there be any conflict of evidence or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established by such testimony.' It does not appear very clearly, from the record in the case at bar, upon what grounds the learned circuit judge held that the questions propounded by the appellant to the expert witnesses were incompetent or objectionable; but it seems probable, from certain intimations made by the learned judge, that the questions were objectionable because they were not based upon the facts as proved by the testimony. So far as we are able to ascertain from the record, this objection does not apply to several of the questions rejected. It may be true that the court ought not to allow hypothetical questions to be propounded to an expert witness which are plainly outside of the case, and based upon a statement of facts as to which there is no pretense that they are proved by the evidence in the case. The rule in that respect must be that, in propounding a hypothetical question to the expert, the party may assume as proved all facts which the evidence in the case tends to prove, and the court ought not to reject the question on the ground that, in his opinion, such facts are not established by the preponderance of the evidence. What facts are proved in the case, when there is evidence tending to prove them, is a question for the jury and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established."] *Quinn v. Higgins*, S. C. Wis., Sept. 22, 1885; 24 N. W. Rep. 482.

5. CORPORATION. [*Contract — Seal.*] *Contract employing a "Timekeeper" need not be under Seal.* —A timekeeper is not such a "superior officer" that his employment by a corporation must be under seal. [In giving the opinion of the court Dubuc, J., said: "In Haigh v. North Brierly Union, 28 L. J. Q. B. 62, the Court held that an accountant employed to audit the accounts of the defendants, was entitled to recover, although the contract was not under seal. In Bateman v. Mayor of Ashton-under-Lyne, 3 H. & N. 323, the plaintiff was held entitled to recover for work done under contract which was not under seal, on the ground that the work so done, if not contemplated by the Act of incoporation, was not expressly prohibited by the said Act; and that the contract under which he claimed was not necessarily illegal and void, or otherwise incapable of being enforced against the Company in a court of law. In Reuter v. The Electric Telegraph Co., 6 E. & B. 341, the charter of incorporation provided that all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the Company, under the authority of a special meeting; the plaintiff sued the company on an agreement above the prescribed value; the contract was a parol agreement made with the chairman; the plaintiff had done the work and received payments by cheques for it. It was held that the contract was ratified, if not authorized by the Company, and binding. In Totterdell v. Fareham Brick Co., L. R. 1 C. P. 674, two men promoted a company, which was incorporated, and had five other persons with them to sigh a memorandum of association, but filed no articles of association, and no shares were allotted, except those of the seven persons who signed the memorandum. The plaintiff entered into an agreement with the promoters, who signed respectively as chairman and managing director. The contract was not under seal. It was held that, in the absence of evidence to the contrary, the jury were justified in presuming that the two directors had authority to bind the company."] *Gordon v. Toronto, &c., Land Co.* S. C. Manitoba, May, 1885; 2 Man. L. R.

6. DURESS.—*When Money paid under, may be recovered back.*—Under duress of imprisonment on a charge of fornication with defendant's daughter, made by the defendant for the purpose of forcing a settlement, the plaintiff agreed to pay money to the defendant. In pursuance of such agreement he executed his notes and a mortgage to M., and M. executed his notes to the defendant, the latter on his part executing a release to the plaintiff. The mortgage was to be signed by the plaintiff's wife and the release by the defendant's daughter; and the instruments were deposited with C., to be delivered by him to the persons respectively entitled thereto after such signatures should be obtained. They were afterwards so delivered, the defendant accepting the notes of M. as payment of the sum agreed to be paid by the plaintiff. After delivery of the instruments to C., but before delivery by him to the respective parties, the plaintiff was released. Held, that the plaintiff, having fully

performed the agreement on his part before the duress had ceased, might recover from the defendant the amount paid on the settlement. *Heckman v. Swartz*, S. C. Wis., Sept. 22, 1885; 24 N. W. Repr. 473.

CORRESPONDENCE.

"LATE WITH."

To the Editor of the Central Law Journal:

Your correspondent, H. W. Baird, is correct in saying, "fewer general attacks by the press on the decisions of our Supreme Court, would be more in consonance with the spirit of our institutions." While this is true, yet, as you suggest, fair criticism of any department of government is not only in consonance with, but tends to preserve the spirit of our institutions. Criticism of the judiciary has been the chief means of changing many unreasonable rules, and has established many wholesome reforms.

The criticism of the *New York Herald* is not only fair, but seems just. The reasons given in support of the decision criticised, do not fully answer the question, "May a person advertise himself as 'late with,'" etc. By such an advertisement how does he injure his former employers? Does he seek trade in their name, or try to avail himself of their good will? Suppose his skill and *finesse* have increased their trade, brought them additional customers, must he ever remain with them? If he quits, perhaps the trade and customers he secured may be lost to his employers. If so, shall he be permitted to leave? If by quitting he will injure his employers, why not compel him to remain? If he has the right to quit, has he not the right to say, privately or publicly, that he has done so? Does the fact that he engages in business for himself deprive him of this right? "Late with" is in effect saying "he is no longer with". Why should he not say this? Should the secret of his quitting be the especial property of his late employers? Would they not thus secure and profit by his "good will" without compensation? "Late with Smith & Co.," is no reflection upon them or their business. Does not the announcement advertise them and their business? The employee by going into business may become a competitor with his former employers; but does he not, in announcing himself "as late with, advertise them as competitors in his venture, and without cost to them? Does not each competitor named stand on his own merits?

Your correspondent, in support of the decision in question, cites the case of a skilled workman, and says, "His employers make and place upon the market a product of his workmanship chiefly. * * * The reputation of the article has been made by the employer" and he, then, asks, "Has, then, the employee a right to trade on such reputation, by announcing himself as 'late with' the reputable employer?" Why not? By paying the workman for his labor while in his employ did the employer acquire the exclusive right to trade upon his skill? Has not the workman a right to make and vend the same kind of article he made for and which was sold by his former employer? Do the words "late with" restrict his right? Does not enjoining such employee from advertising himself as "late with" indirectly aid the employer to deceive those of his customers who put their faith in the former and not the latter?

The statement of the foregoing interrogatories suggest the correct answers. CHAS. D. KELSO.

New Albany, Ind.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

* Several queries and answers stand over for insertion in our next number.

QUERIES.

28. Apropos the case of People v. Marx, 21 Cent. L. J. 337, I wish to submit the following: During the last two months several fires have occurred in Gallatin, Tenn., which are believed to be the work of incendiaries. In order to protect property more fully, the municipal authorities have enacted the following ordinance: "An Act, entitled an Act to afford additional protection to all property situated within the corporate limits of the town of Gallatin, Tenn. § 1. Be it ordained and enacted by the Mayor and Board of Aldermen of the town of Gallatin, that hereafter all the owners of business houses shall be required to suspend business with their customers, and close their houses at ten o'clock, P. M., and to keep the same closed and the business aforesaid suspended for the remainder of the night. § 2. Be it further enacted that it shall be unlawful for any person or persons to be upon the streets of Gallatin or in any public place within said town after ten o'clock, P. M., until daylight following, except it be that such person has business or engagements that call him or her upon the streets or in such public places after the hour aforesaid, and any such person found upon or at any such places without a reasonable and genuine excuse, shall be in violation of this section of this act; it being the purpose of this act to prevent persons from strolling about the town who have nothing calling them out after the hour aforesaid. § 3. Be it further enacted that any person violating the provisions of this act except in case of necessity are hereby declared to be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $3.00 nor more than $50.00 for each offense, to be paid or secured, as other offenses are now provided for by law. § 4. Be it further enacted that for the better enforcement of the provisions of this act the mayor is hereby authorized to appoint under the laws now in force, four policemen, whose duty it shall be to keep a vigilant watch, and see that this act is faithfully enforced and observed by all persons, and forthwith to arrest all persons violating the same, and it shall be their duty to enforce all the other laws of the corporation, and to this end they are clothed with like power of the city marshal. These policemen shall be paid the sum of $2.00 each per night for all the services rendered. § 5. Be it further enacted that this act take effect from and after its passage, the public welfare requiring it." The charter contains no special authority on this subject, but Code of Tennessee, § 1607, sec. 1, provides that all municipal corporations shall have power "To enact such by-laws and ordinances as may be necessary and proper to preserve the health, quiet, and good order of the town." W. B. S.

[Turn back, O thou jibbenannosay of little wit, to 20 Cent. L. J. 383.—ED.]

29. If an officer is charged with the duty of executing a criminal, he can do so only in the way directed by the judgment or statute. An execution in any other way, (as where the judgment requires a hanging, and the officer substitutes beheading) will render the officer guilty of murder. 4 Black. Com. 178, 179, 404. In case of the inflicting of the death penalty, suppose that "the punishment of death, prescribed by law, must be inflicted by hanging by the neck until the

person is dead." And suppose further that the sheriff purposely constructs the scaffold with the design that the prisoner, when the drop shall be let down, shall fall so far that he will break his neck; and in pursuance of the design the prisoner's neck is broken, and death results from the breaking, although the superadded hanging would also produce death, but not so quickly. Is the officer guilty of murder? Suppose the fall had broken the prisoner's neck and at the same time the rope, and the prisoner had been permitted to lie on the ground until death took place, or that a new rope could not be procured until death took place; would the officer be guilty of murder? In case an officer is charged with executing a prisoner, would it be a violation of his duty to so stupify the prisoner by the use of intoxicating liquor or anæsthetics that he was rendered totally unconscious, and the execution was then performed? X. Y. Z.

30. P and wife conveyed by warranty deed to their daughters a tract of land. In the face of the deed is reserved to the wife and mother a life estate in all the land conveyed. Can either of the daughters compel partition of the land amongst the daughters during the life of their mother, under the Missouri statute. If not why, and cite authorities. G.

31. A, B and C join in the execution of an instrument in the following language: "We authorize D to sell and convey any real estate in which we now are or may hereafter become jointly interested." Thereafter A dies. Will a deed by D under such authority—purporting to convey the entire estate to one ignorant of A's death operate to pass the interest of B and C? Answer citing authorities. K.

QUERIES ANSWERED.

Query 22. [21 Cent. L. J. 323.] O, on a bill charging cruelty, obtained a decree of divorce from her husband. The decree awarded the custody of a six year old daughter to O. O did not ask for alimony, and the decree is silent as to the expenses of rearing the child. The child's shoulder was accidently broken after the divorce, and while the child was in the custody of O. Can W, a surgeon, who treated the child professionally on account of the broken shoulder, recover of the divorced husband of O, the father of the child? The parties reside in Illinois, and the divorce was obtained there. D. D. O'BRIEN.

Dixon, Ill.

Answer. The children are no parties to the quarrels of their parents, and they lose no rights by the decree of divorce. 2 Bish. Mar. & Div. § 552. The father remains bound for the support of the child though custody be awarded to the mother. Plaster v. Plaster, 47 Ills. 290.

ANOTHER ANSWER.—The law of nature, the usages of society, as well as the laws of all civilized countries' impose the duty upon the parents of the support, nurture, and education of children, so long as they are of tender years and unable to provide for themselves. This duty devolves first upon the father, and next upon the mother. The fact that the court has adjudged the father to be unfitted to have the custody, care, and education of the child, does not, and cannot release him from both his natural and legal duty. His legal obligation to pay the surgeon who rendered the necessary professional assistance is in no way discharged by the decree of divorce. *Vide* Plasters v. Plasters, 47 Ill. 290. FRANK B. STANLEY.

Fort Worth, Tex.

A CONTRARY ANSWER.—The care and custody of the child having been decreed to the wife, the husband was released from all responsibility for its maintenance and support, except such as may be provided in the proceedings for divorce. The court doubtless has power to make such provision as part of the original decree, or at any subsequent time. The wife had no authority to bind the husband by a contract to pay for the services of the physician, and no contract can be implied under the circumstances. Bow v. Brightman, 136 Mass. 187; Burrows v. People, 107 Mass. 428; Hancock v. Merrick, 10 Cush. 41; 2 Bishop's Mar. & Div., §§ 557, 557*a*.

Madison, Wis. R. M. BASHFORD.

Query 18. [21 Cent. L. J. 299] A was guardian of B, and with her consent, after her majority, gave to C, her husband, his note, with sureties, for the amount due on account of moneys which came into his hands as such guardian. A then received from the court his discharge as guardian. Subsequently he was adjudged a bankrupt and received his discharge, this claim being proved and a dividend being paid thereon. Did this discharge release this debt, or does it come within the provisions of § 5,117 Rev. Stats. U. S., as to debts "created while acting in a fiduciary character?" Prompt answer and citation of cases desired. M.

Answer. The general rule is that a promissory note will not be regarded as payment of the previous debt; but the question is one of intention. The acceptance of note with sureties, and the discharge of debtor as guardian would be regarded as payment of trust debt in the absence of anything showing a contrary intention. Hunt v. Nevers, 15 Pick. 500; Nightengale v. Chafee, 11 R. I. 609. This being true, there was no debt "created while acting in a fiduciary character," existing at the time of the bankruptcy.

DEDIMUS POTESTATUM.

Query 15. [21 Cent. L. J. 299.] C was indicted for assault and battery with deadly weapons with intent to murder J. At the time this indictment was found, it was believed J would recover from his wounds. C was tried, convicted, and sentenced to the penitentiary. Subsequently J died from the injuries inflicted. Is C now indictable for murder? If so, what bearing will the conviction for the A & B have upon the trial for murder? If upon the trial for murder he is acquitted, does the acquittal supersede and annul the sentence under first conviction, or will he be remanded to serve out his term? Who is the proper custodian of his body pending the second proceedings, the superintendent of the penitentiary, or the jailor of the county? Facts have occurred within last ninety days.

Raymond, Wis. M.

Answer. The conviction of C for assault will be a bar to an indictment for murder. Twice in jeopardy for the same offense does not signify the same *eo nomine*, but the same criminal act or omission: Hirshfield v. State, 11 Tex. App. 207; Holt v. State, 38 Ga. 187. If C had been acquitted, it would have been a bar, for the acquittal for an inferior crime shows that the larger could not have been committed. 1 Stark. Crim. Pl. 322. And "where a person has been convicted of an act which is the constituent part of a greater offense, he cannot afterwards be prosecuted for the greater:" Wilson v. State, 24 Conn. 57, 68; Com. v. Hawkins, 11 Bush. 603. In no event would the mere finding of new indictment annul a previous judgment, therefore the superintendent of the penitentiary would be entitled to custody. SCIRE FACIAS.

Another Answer. If C was indicted for an assault and battery with intent to murder and was tried, con-

victed and sentenced, he cannot of course, be tried again for the same offenses, nor any lesser offense of which he might have been convicted on that trial, as the lesser is merged in the greater offense. He can, however, be tried for a greater crime, as in this case murder would be. He has not been tried for this crime. State v. Littlefield, 35 Am.R.335,and cases there cited. Consequently, a former conviction of an assault and battery is no bar to an indictment for manslaughter. State v. Littlefield, *supra*. He cannot be tried for murder until he has served out his sentence. Reason and authority seem to support this view; but decisions are conflicting. For an opposite view see State v. Hallabough, 66 Ind. 223. A. C. KREZ.

Sheboygan, Wis.

Query 7. [21 Cent. L. J. 159] What degree of care and diligence is required of a private carrier for hire in the transportation of a passenger? Please cite authorities.

Answer. A private carrier is bound to the same degree of care as a bailee for hire. Lawson Carriers, § 110; R. R. v. Lockwood, 17 Wall. 357, 377; Schouler Bail. 100, 102; 2 Kent Com. 597; Pennewall v. Cullen, 5 Harr. 238, 242; and is therefore bound to exercise the same degree of care which prudent persons are wont to exercise in the conduct of their own affairs under like circumstances. Schou. Bail. 103.

O. U. BETT.

RECENT PUBLICATIONS.

MYER'S FEDERAL DECISIONS, VOL. 9.—Federal Decisions: Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Arranged by William G. Myer. Vol. 9. Conveyancing—Coroners. St. Louis, Mo.: The Gilbert Book Co., 1885.

The ninth volume of this important work includes the subject of Conveyancing, divided into four subdivisions: A. Deeds; B. Mortgages of Real Estate; C. Railroad Mortgages; D. Chattel Mortgages. The manuscript of this volume, after being prepared by Mr. Myer, was edited by Mr. Leonard A. Jones, of Boston, author of several well known legal treatises. We venture the opinion that the collection of cases on Railroad Mortgages which this volume embraces, will go further to demonstrate the usefulness of the plan upon which this work is constructed than any matter in the preceding volumes. It has in all nine hundred octavo pages, well printed.

AMERICAN DECISIONS, VOL. 64. — The American Decisions: Containing the Cases of General Value and Authority, decided in the Courts of the Several States from the Earliest Issue of the State Reports to the Year 1869. Compiled and annotated by A. C. Freeman, Counsellor at Law. Vol. 64. San Francisco: A. L. Bancroft & Co., 1885.

The cases included in this volume were decided during the years 1855 and 1856. Extended and useful notes are found on the following subjects: Liability of Public Officers for Acts done in Excess of Power, pp. 51-55; Servants—Liability of Fellow Servant for Negligence, pp. 56-60; Amendment of Writs by Changing Name of Party, p. 63; Admissibility of Evidence Concerning Offers of Compromise, p. 98; Conveyance by Trustee, p. 199; Liability to support Poor Relations, p. 279; Assignment of Bonds, p. 428, *et seq.* The notes seem to grow in extent and value; and every time we open a new volume of this excellent series, the regret recurs that the publishers did not group their decisions alphabetically, according to general subjects of decision, instead of republishing them chronologically. In this regard the plan of Myer's Federal Decisions is immeasurably superior to the plan of this work. Here, for instance, is a valuable note on the subject of Receivers, appended to a case on that subject. If all the cases on the subject of receivers which will be scattered through the series, were collected in one volume, how much it would facilitate the labors of the brief-maker, or of the practitioner who might want to read from the body of the decisions in open court.

DEERING'S ANNOTATED CODES AND STATUTES OF CALIFORNIA, VOL. 3.—The Codes and Statutes of California, as amended and in force at the close of the twenty-sixth Session of the Legislature, 1885, with Notes containing references to all the Decisions of the Supreme Court construing or illustrating the Sections of the Codes, and to adjudications of the courts of other States having like Code Provisions. In four volumes. By F. P. Deering, of the San Francisco Bar. San Francisco: A. L. Bancroft & Co., 1885. Vol. 3.

The volume before us is a most exhaustive annotation of the California Code of Civil Procedure. The decisions of the Supreme Court of California greatly predominate in the citations, but decisions of many other courts are given. This work is a monument to the industry, skill and thoroughness of the author. Every page speaks in his praise. Nothing which we have had in our hands promises to be so useful to practitioners in California, in Nevada, and in other States and Territories practicing under the same or a similar code. The manner in which it is printed is much to be praised. The page is large and the text of the various sections of the code is printed in open type, extended across the page; but the notes, which are very extensive, are printed in double columns and necessarily in fine type. As a work for the every day wants of a lawyer or judge, we doubt whether too much can be said in its praise.

NEW JERSEY EQUITY REPORTS, VOLUME 39.—Reports of Cases decided in the Court of Chancery, the Prerogative Court, and on Appeal in the Court of Errors and Appeals, of the State of New Jersey. John H. Stewart, Reporter. Trenton, N. J.: The W. S. Sharp Printing Co., 1885.

New Jersey is a small State, but it has a good many old fashioned ways which illustrate the paradoxical truth that, in respect of legal reforms, small bodies move slowly. Among the peculiarities of her judicial system which have come down from ancient times, is that of "judges specially appointed." These "judges" are not judges at all, for they have not the qualifications of judges. They are not learned in the law. In fact they are laymen appointed to sit as judges of the Court of Errors and Appeals; and there they sit like flies on a balance-wheel and do just as much good. This ancient humbug has come down from the time when the people entertained a profound distrust for lawyers, and when it was thought necessary to have some laymen on the bench to infuse a little popular justice into the decisions. Attempts have been made, we are informed, from time to time, to assemble a constitutional convention in that State, to rid the people of such a wretched state of things. But there are two opposing influences: the one is the country voter and the other is the Pennsylvania Railroad Company. Formerly, it was the Camden & Amboy Railroad Company, and twenty-five years ago it was proverbial throughout the United States that that corporation owned the legislature of New Jersey. The great properties or that company have passed into the hands of the Pennsylvania Rail-Company, and the Pennsylvania Railroad Company is

prospering so well in New Jersey that it does not want its dreams disturbed by a constitutional convention. Then, New Jersey is a rotton borough state. The country holds the balance of power, as against the cities, in the legislature, under a system of representation established in ancient times before the cities had become great and populous, whereby the rural minority rules the urban majority. The farmer—the so-called "honest" farmer—insists upon the perpetuation of this injustice, and votes against every proposition to call a constitutional convention, because he fears that when that body meets justice will come, and the people will be represented in the legislature according to population. He fears it, though he does not know it. The example of Missouri might teach him that such a result may not follow the calling of a constitutional convention. Our last constitutional convention committed the enormous injustise of disfranchising the city of St. Louis of its just representation in the house of representatives. We have opposed in these columns a federal coercion of the States, and especially the process of sapping and mining by which the federal courts have, during the last twenty years, have been erecting a general superintending jurisdiction over States functionaries. But we are also opposed to rotton borough republics. They are as unjust as slavery; they stink in the nostrils of the age; and while they exist in the American Union the United States does not perform its office of guaranteeing to each State a republican form of government. In construing statutes the word "may" is often read "shall," and in the clause of the federal constitution to which we allude, the word "form" ought to be read to mean "substance." The United States ought to take New Jersey and Missouri by the necks, and every other rotton borough state in the union, if such there be, and compel them to reorganize their governments upon a system of honesty and justice, that is, of equal representation.

Public justice between man and man in the courts is no doubt well administered in New Jersey. In fact "Jersey justice" is proverbial throught the Union, and is as much of a terror, as "Jersey lightning" is an attraction, to the evil doer. New Jersey has the old fashioned system of a separate court of chancery. It has not fallen into the procession by adopting the improved code of procedure, or the fusion of the systems of law and equity. But in spite of all its drawbacks justice seems to be well and promptly administered in its courts. A lawyer has to know a good deal to practice under such a system; that is to say, he has to have an enormous amount of technical knowledge stored away in his cranium. He has to be a sort of Dicky Demurrer, and when he gets to that point he makes money. A good many lawyers in New Jersey are making handsome incomes, and not killing themselves either. In fact we are told that a practitioner who is daily in the court of chancery, like Mr. Carter, of Jersey City, is supposed to make an income of from $20,000 to $25.000 a year. A lawyer working just as hard in St. Louis would make about one-half that much, and it costs him just as much to live as it costs the Jersey lawyer. We hope our Missouri brethern will not, after reading this, make the mistake of marching in a body to New Jersey. After having been an attorney under our code it would take a Missouri lawyer so long to learn the *absque hocs* of the common law system of that State, that he would die before getting acclimated.

But we forgot to say something about this book. Mr. Stewart is one of the best of the reporters, and we judge that he holds the copyright of his reports, for they are copyrighted in his name, and he takes pains o add to their value by annotating many of the cases His notes are very good indeed. We have heretofore published some of them from time to time, from advance sheets which he has sent us. We notice that he very often cites the CENTRAL LAW JOURNAL. How could he do otherwise?

JETSAM AND FLOTSAM.

THE LAWYER'S FEES.—One of the early puzzles of young attorneys is the knack of charging for services. Not that they lack confidence in their worth and value, but they do know how to put things in a way to secure money. The shifts and turns of poor clients to avoid paying are novel and numerous. Some promise money on trial day, and are more likely to fulfill by borrowing a judgment fee and never paying either. Others have a great case ahead just about ready to turn over to some bright lawyer, and know of "lots of business" that they can influence, until the young lawyer finds his docket well filled with appeals and dead cases to waste his time upon, and never realizes anything for his services. The best way to do with such cases is to ignore them. Any case, unless one actually secure in nature by a rich defendant or a reliable plaintiff, is worth advancing for before taking. And right here is the place to do the fine work. Don't be afraid to say, "To try this case will demand hard work before trial day." At no time after a suit is started and under way will a client so fully appreciate its importance as at the moment of going to law. That is the ripe season to contract for and fix the fees and bind the bargain. That is the time when in reclaiming estates a reasonable allowance will be furnished and a contract may be made for the entire compensation; that is the time when the motto "it's a poor cook that starves himself to death" should apply. Rely upon it, you can never quite so well secure or explain high charges as by a written memorandum made and signed early in the contest. Try it. By this plan are thousands made yearly. I know of one case where $200,000 was so made in New York. J. W. DONOVAN.

THE CANDIDATE OF BOTH PARTIES.—The Republican and Democratic Judiciary Conventions of Brooklyn have done well in renominating Justice Joseph F. Barnard of the Supreme Court. This emphatic indorsement by both parties is a deserved compliment to an able, upright and faithful judge, and renders his re-election certain. The disposition to divorce politics from nominations for positions on the benches of our chief courts is thoroughly praiseworthy. Two precedents for such action have been set in recent years. Judge Brady in New York and Judge Pratt in Brooklyn having received the united support of both parties. Judge Barnard is a Democrat and has already served two terms.—*N. Y. Tribune.*

BLUSHED AND SWAM OUT.—A lawyer recently went into the surf to bathe, and encountered a huge shark. Their eyes met for an instant, when the shark blushed and swam out.—*O. Gagge.*

THE INSANE JUDGE.—Judge Levy: "That was a bad mistake you made in appointing me in Judge Clough's place."

"Dreadful," said the Governor. "All the cases you decided will now have to be re-opened."

Judge L.: "Do you think he will reverse any of my decisions?"

"Certainly," replied the Governor. "He has recovered the full use of his faculties."—*O. Gagge.*